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In the

SUPREME COURT of the UNITED STATES

OCTOBER TERM 1929

No. 45

TAGG BROS. & MOORHEAD, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

BRIEF OF APPELLANTS.

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BRIEF OF APPELLANTS.

The opinion below is reported in 29 Fed. (2d.) 750. Paragraph 1 of Rule 12 has heretofore been complied with.

STATEMENT OF THE CASE.

January 16, 1926, appellants filed with the Secretary of Agriculture a schedule of live stock commission rates at Omaha, known herein as Tariff No. 2 (R. 13), amending Tariff No. 1 (R. 10) theretofore in effect. January 25, 1926, the Secretary suspended Tariff No. 2 and ordered a hearing as to its reasonableness (R. 20-3). November 19, 1926, he issued an order (R. 23-42) under the Packers and Stock Yards Act (Ch. 64, 42 Statutes at Large 165; U. S. C. 1925, Title 7, Ch. 9) permanently

suspending Tariff No. 2, and prescribing in lieu thereof a new schedule effective January 1, 1927 (afterward changed to February 1). Appellants, market agencies affected by said order, instituted proceedings in the court below to set aside said order and enjoin its enforcement. The proceedings were referred (R. 52) to a Special Master, who recommended (R. 57-145) a decree permanently enjoining the enforcement of the schedule of rates prescribed by the Secretary. The cause thereupon coming before the court upon the evidence, the report, and the appellees' exceptions thereto, the Court filed an opinion (R. 164-80) and entered a decree (R. 181) dismissing the petition of the appellants and dissolving the temporary injunction theretofore granted. Timely appeal was taken to this Court by all of the plaintiffs and intervenors.

There are presented for the consideration of this Court the following questions:

(1) Whether the Packers and Stock Yards Act, insofar as it purports to authorize the Secretary of Agriculture to fix the commissions charged by appellants for the buying and selling of live stock, is unconstitutional.

(2) Whether the Act gives the Secretary power to issue a rate making order to market agencies, such as appellants.

(3) Whether the order violates the provisions of the Fifth Amendment, depriving appellants of their property without due process of law, in that the rate prescribed therein is unjust, unreasonable, non-compensatory and confiscatory.

The statutes involved are set out in an appendix hereto.

THE PLEADINGS.

The amended petition (R. 1) filed by three appellants with whom all other market agencies at Omaha joined by intervention (R. 53), after reciting the jurisdictional and a brief outline of the preliminary facts, alleged that such order is illegal and void for the following reasons (R. 4-9):

(a) The Packers and Stock Yards Act does not give the Secretary any power to issue an order to market agencies such as appellants at the conclusion of any hearing before him, his authority in that respect applying only to the owners and operators of stockyards and not to market agencies.

(b) By the terms of Section 306 (e) of the Act, and by the terms of the order of suspension of January 25, 1926, the lawful scope of the inquiry did not extend beyond the question whether Tariff No. 2, insofar as in excess of Tariff No. 1, was unlawful or was unjust, unreasonable or discriminatory.

(c) The rates and charges prescribed by the said order are unjust and illegal in that they will not provide sufficient remuneration to repay appellants their expenses and a reasonable and just compensation for their services, and the enforcement of the order will have the effect of depriving appellants of their property

without due process of law, contrary to the provisions of the Fifth Amendment to the Constitution of the United States; in other words, the schedule prescribed by the Secretary's order is non-compensatory, confiscatory and therefore illegal and void.

(d) The evidence presented to the Secretary was not sufficient to establish that either Tariff No. 1 or Tariff No. 2 was unjust, unreasonable and discriminatory, or to establish that the schedule prescribed in the order of November 19, 1926, would adequately compensate appellants for their services and for the disbursements made in rendering same.

(e) That the Secretary's order, insofar as it seeks to compel appellants, if they wish to continue in business, to render the services required and expected by their customers, and necessary to enable them to continue in business, at a rate fixed by the Secretary, is violative of the rights of appellants and their customers under the Fifth Amendment in that it deprives them of their freedom of contract and forbids them to sell their services at a price satisfactory to them and their customers; and that so much of the Packers and Stock Yards Act as authorizes the Secretary to prescribe appellants' rates and charges for the personal service rendered by them to their customers, violates the Fifth Amendment in that it deprives appellants of their property and liberty without due process of law. That if the

Act can be interpreted as conferring any power upon the Secretary to fix maximum rates to be charged by appellants for their personal services, then so much of the Act as purports to confer such power is null and void as in excess of the power granted to the Federal Government by the Constitution of the United States. That the power to fix maximum commissions for personal services is not a regulation of commerce within the meaning of the Constitution, nor is conferred by either the commerce clause or any other provision therein.

The petition then alleges irreparable injury and the right to equitable relief (R. 7-9). The prayer (R. 9) is that the order of November 19, 1926, be found and declared null and void and be set aside and that the appellees, including the Secretary, the Attorney General and the local District Attorney, be enjoined from its enforcement and from cancelling appellants' registrations as market agencies or enforcing the penalty sections of the Act.

Pursuant to the prayer a temporary injunction was granted (R. 43) and on March 15, 1927, the same was continued pending final decree.

The answer (R. 44-9) filed by all defendants admits the jurisdictional averments of the amended petition; admits the filing by appellants of Tariff No. 2 and the order of suspension thereof; says that the recitals of the amended petition concerning the contents of the order of November 19, 1926, are not a complete statement of its contents and prays reference to the order itself as to its

contents, meaning and legal effect; and as to the merits, says:

(a) That the recitals as to the power conferred upon the Secretary are conclusions of law, but denies that the order is illegal or void for that or any other reason.

(b) That the recitals in the amended petition as to the scope of the order of suspension are conclusions of law, but denies that the order of November 19, 1926, is void for that or any other reason.

(c) That while the allegations as to the non-compensatory and confiscatory effect of the order of November 19, 1926, are either conclusions of law or statements of fact irrelevant to the validty of the order, nevertheless admits that the schedule contained in the order, will result in an aggregate reduction in the gross returns received by appellants; but denies each and every other allegation and alleges that the aggregate reduction is grossly exaggerated by the allegations of the appellants.

(d) That the allegations as to the sufficiency of the evidence before the Secretary to establish that either Tariff No. 1 or Tariff No. 2 was unjust, unreasonable or discriminatory are inadequate and erroneous statements of the legal effect of the evidence at the hearing and as such are mere conclusions of law and irrelevant and immaterial to the validity of the Secretary's order; but that such allegations are none the less denied, and defendants further allege that the evidence presented

at the said hearing was sufficient to warrant the Secretary's finding that Schedule No. 2 was unjust, unreasonable and discriminatory. That with respect to the allegation that the evidence was insufficient to show that the rates prescribed by the order of November 19, 1926, would adequately compensate appellants, the same is an inadequate and erroneous statement of the meaning or legal effect of said evidence and as such is a statement of legal conclusions and is furthermore immaterial to the validity of the order, but defendants nevertheless deny that the evidence so presented was not sufficient to show that the rates prescribed by the Secretary would adequately compensate appellants and that the evidence presented warranted him in fixing the schedule prescribed in the order of November 19, 1926.

(e) Denies that the order of the Secretary violates the Fifth Amendment for the reasons outlined in subparagraph "e" of the above summary of the petition, or for any other reason.

The prayer of the answer is a general one for dismissal and costs.

The appellants filed motion (R. 50) for reference to a Special Master, which was sustained (R 52) with directions to consider the evidence, both that submitted before the Secretary and any additional evidence introduced by either party, and report back to the court findings and conclusions of fact.

The report of the special master (R. 57-145), after an extensive review of the proceedings and of the evi-

dence, Findings of Fact Nos. 1-58 (R. 74-112) concluded, on the facts, by finding that the rates prescribed by the Secretary in his order of November 19, 1926, are confiscatory, for extensive reasons based upon the previous findings (Finding of Fact No. 59, R. 112). As a conclusion of law the master held that the Packers and Stock Yards Act, if it can be construed as vesting in the Secretary of Agriculture the right to determine and prescribe maximum charges to be made by appellants for their services in the buying and selling of live stock, is, as to so much of the Act as seeks to vest in Secretary such power, unconstitutional (R. 117-44).

The appellees filed exceptions to the report (R. 145-62), excepting to sundry specified findings on thirty-three grounds (R. 145-61). In Exception No. 34 (R. 161) they excepted to the report as a whole on account of its failure to find facts in harmony with the Secretary's order. The exceptions conclude by excepting to the master's conclusion of law as to the unconstitutionality of the Act (R. 163), and pray that their exceptions be allowed; that the report of the special master be wholly disapproved, and that the cause of the appellants be dismissed for failure of the evidence to sustain their material allegations, with general equitable relief (R. 163). Neither in the opinion (R. 164-80) nor in the decree (R. 181) did the court deal specifically with the report or the exceptions thereto; none of the exceptions was allowed specifically, nor was the report disapproved in whole or in any part.

———o———

THE ORDER OF NOVEMBER 19, 1926.

The order of the Secretary which is the basis of these proceedings is set out in full (R. 23-42). Some features of it require special notice herein.

Paragraphs 1-5 are devoted to a summary of the proceedings to that date, and a statement of the "basic rates" of Tariff No. 2.

Paragraph 6 sets out the increases in Tariff No. 2 as compared with Tariff No. 1. The order then defines the problem of the Secretary, to arrive at a rate as nearly as possible approximating that which would obtain under conditions of reasonable normal competition, and sets out the alleged basis upon which the rate about to be ordered is arrived at (par. 8, R. 28): "therefore the present problem is approached with the thought that commission rates yielding a reasonable profit above normal cost are reasonable."

The order then refers to the alleged elimination by appellants of competition among themselves, and says: "If the owners of the 68 firms and corporations composing the respondents can, through a committee, or by whatever machinery they see fit to adopt, arrive at the rates to be charged the shippers, a disinterested Governmental agency can fairly arrive at such rates". In the next paragraph appellants' contention, that rates may not be fairly ascertained without reference to the varying degrees of ability and experience of those engaged in the business, is answered by stating that appellants have "by requiring each to charge the same rates regardless of individual efficiency, placed themselves on the same level." (pp. 41-42).

The order then selects 1925 as a typical year, and proceeds to classify appellants into volume groups based on relative volume of rail receipts, as follows:

Group A, each firm of which handled above 3500 cars of livestock.
Group B, each firm of which handled between 2000 and 3500 cars of live stock.
Group C, each firm of which handled between 1000 and 2000 cars of live stock.
Group D, each firm of which handled between 500 and 1000 cars of live stock, and
Group E, each firm of which handled less than 500 cars of live stock.

The receipts by rail among the 61 firms doing business at the end of 1925 were divided as follows:

Group A— 8 firms handling above 3500 cars rec'd 37%.
Group B— 7 firms handling 2000 to 3500 cars rec'd 18%.
Group C—17 firms handling 1000 to 2000 cars rec'd 27%.
Group D—18 firms handling 500 to 1000 cars rec'd 15%.
Group E—11 firms handling under 500 cars rec'd 3%.

The order then proceeds to a summary of average owner income, that is, the amount which the owner or owners of each firm have left for personal use after paying the expenses of the business, whether this income was received as drawings, salaries, profits or all combined; attempts to state gross commissions per car per species from Tariff No. 1 to 1925 rail receipts, and then attempts to arrive at a lowest, a highest and an average gross commission, with an average for the market for each species. Whether these averages are arrived at from group to group or firm to firm is not stated.

The Secretary then states (paragraph 14, R. 32) that in view of the fact that some firms operate entirely through employees with salaries fixed by bargaining, while others operate partially or entirely through owners whose salaries represent drawing accounts rather than bargained salaries and in many cases do not appear on the books, "it is impossible to contrast with the above stated per car commissions the cost of rendering the service, either as to individual firms or volume groups, without a distortion which renders the contrast valueless." The Secretary, nevertheless, proceeds to attempt the impossible by the device of setting up as to each species "an account showing the normal and reasonable cost per car of rendering the service." This is done, not by using averages, but by adopting a "normal" of costs to the firms "whose financial condition exhibits ordinary efficient management of their business."

This severance of the Gordian knot introduces an important phase of the question whether the order is confiscatory, and therefore deserves particular attention. An analysis of paragraphs 15-20 (R. 32-5) shows that, after stating that in setting up individual cost accounts, all expenses are allocated directly to the three species where possible and that in cases where it is not possible to allocate directly, allocation is made on the basis of gross income, the Secretary, none the less disregards actual expenses entirely, as well as the actual results in operation of salesmanship and the other factors whose "normal cost" is under investigation, and applies a purely theoretical normal of what the Secretary, or whatever subordinate drew the order for him, thought such normal

cost ought to be under the circumstances shown by the record. The first item of cost arrived at in this way is that of salesmanship, paragraphs 16-18. There, after referring to certain testimony of a shipper as to the number of cars of live stock which an ordinary salesman "could sell in a reasonably efficient manner in one year," the order refers to the cattle and hog salesmen in Group A as having "had the largest opportunity to display their ability as to those species;" while the sheep salesman in Group C are considered as having had the similar opportunity with reference to that species. This conclusion seems to be based entirely on the volume of live stock handled by the respective firms to which these salesmen were attached, as compared with the number of salesmen employed, without reference to any other circumstance. After stating that an average of the salesmen in these groups was 932 cars of cattle, 932 cars of hogs and 757 cars of sheep respectively, the Secretary finds that the fair market value of the services of a competent salesman is $5,000 as to cattle and sheep and $4,000 as to hogs, and that "upon the foregoing bases it is considered that a reasonable cost per car for salesmanship is $5 for cattle, $3 for hogs and $5 for sheep." Needless to say, this would mean averages per salesman per year of 1,000 cars of cattle, 1,333.33 cars of hogs and 1,000 cars of sheep.

Similarly, paragraph 19 (R. 34) is devoted to the expenses of advertising and other modes of business-getting and after a review of the lowest, highest and average percentage of gross commissions spent for business-getting by the several volume groups above referred to,

finds that 10% of gross commissions received is a reasonable expenditure for business getting—though the findings themselves show an average for all firms of 14.85% and also show that the higher the volume, the larger the percentage of expenditure for these purposes. This 10%, with some adjustment to produce round figures, is then applied to the average gross commission above referred to as an element in the so-called cost account. Whether the average expenditure or the 10% finally allowed is applied on a firm to firm or group to group basis does not, of course, appear.

Paragraph 20, p. 49 allows interest at 7% on the aggregate capital devoted to appellants' business. The order then proceeds, in the same paragraph and without further analysis of the other items, to summarize the cost account as follows:

Item	Cattle	Hogs	Sheep
Yardmen's Salary	$1.75	$1.50	$1.50
All other salaries	2.00	1.60	1.80
Travel, entertainm't, advertis'g, etc.	2.00	1.50	2.25
Overhead, including increased rental of $54,000	1.75	1.50	1.75
Exchange Assessments and Dues	.25	.25	.25
Total	$7.75	$6.35	$7.55
Salesmanship	5.00	3.00	5.00
Interest	.50	.50	.50
Total Cost	$13.25	$9.85	$13.05

It will be noted at once that no "normal" is set up for depreciation, bad debts, investments such as exchange memberships which do not happen to appear on the books, going value of business, or supervision; and

that the validity of the finding as to the "normal cost" of salesmanship and business-getting depends on the soundness of the bases used in arriving at the "normals" above set out.

The order then proceeds (R. 36) to a comparison of average gross commissions and the above found "reasonable expenses," to arrive at the resultant profit; refers to profit on investment made by the producers of live stock; refers again to the "monopolistic power of fixing charges arbitrarily without the usual attendant economy of minimizing expenditures for business-getting" alleged to be exercised by appellants herein, and makes the following observation (which seems also to lack premises to support it): "When rates so fixed in a business which has been subjected to public regulation yield the percentages of profit hereinbefore shown, they are unreasonable *per se.*"

Paragraphs 23-25 (R. 37-8) are then devoted to the alleged complications in Tariff No. 2, including a criticism of the half-rate allowed yard traders and exchange members, and paragraph 26 (R. 38) contains a finding that the rates and charges shown in said tariff are unjust, unreasonable and discriminatory. The order concludes by determining "that the following are schedules of just and reasonable charges," setting out the rate schedule now sought to be enjoined, and makes the usual order for publication and for the suspension of all rates in excess thereof, together, of course, with a permanent suspension of Tariff No. 2. The level of rates prescribed is materially below both Tariff No. 1 and Tariff No. 2; and the order is so framed as to permit charging a full commission to yard traders and exchange members.

THE EVIDENCE.

The evidence originally consisted of over 2000 typewritten pages oral testimony and about 125 exhibits, some of them of great bulk. The oral testimony has in this record been reduced to 264 (R. 181-360, 714-98), and the exhibits to 386 printed pages (R. 361-714, 798-831), of which the separate audits of the individual appellants occupy 299 pages (Exs. 7-65, R. 400-699). It is manifestly impossible herein to do more than refer briefly to this evidence, with some tabulation of the financial data in the audits.

As to the question of the constitutionality of the Act, if it be so construed as to permit the Secretary to fix commissions charged by appellants for personal services, there is no disputed question of fact; that is, it is conceded that the business of appellants is that of rendering personal service by private agreement with their customers. The record as a whole, however, showing in detail how appellants' business is carried on, is eloquent of the difficulties and inequalities inseparable from such regulation.

On the issue of confiscation, the following is a brief summary of or reference to those portions of the record dealing with appellants' contention that the Secretary's order is invalid because of

(a) Erroneous methods, in disregard of the undisputed facts, used in arriving at items of "normal cost."

(b) Items of normal cost omitted, which must be included to make the rate base valid.

(c) The unreasonableness of the rate prescribed considering the situation disclosed by the record generally.

1. Selling Costs.

Selling costs per car are set up in the Secretary's order (R. 34) at $5.00 for cattle, $3.00 for hogs and $5.00 for sheep; selling services are fixed for rate making purposes at a "normal" of $5,000.00 per year for cattle and sheep and $4,000.00 per year for hogs. Hence the rate is based upon averages per salesman per year of 1,000 cars of cattle, 1,333.33 cars of hogs and 1,000 cars of sheep.

This portion of the order finds support in the record only in the opinion of witness Mollin, (R. 262-266), a shipper but never a livestock commission broker, that a competent salesman could handle from 2,500 to 3,500 cars of hogs per year and 3,500 to 5,000 cars of cattle if he had them to sell.

At the hearing before the master the Government offered the deposition of William E. Reed (R. 791) to the effect that a salesman receiving $6,000.00 per year ought to sell not less than 3,000 cars per year. This testimony was, of course, not part of the record before the Secretary. The witness stated, however, that the number of cars a salesman can sell in a year depends on

the market and the class of live stock; that there is no such thing as knowing in advance how many cars a salesman can sell in a year; that his firm does not have salesmen who sell that many cars a year; and that there is no such thing on the market, (R. 798). On the other hand the testimony of witnesses Tomlinson, (R. 240-242), Wilkerson, (R. 278-82), Burke, R. 273) and Johnson (R. 298-304), called by the government at the hearing before the Secretary, and that of witnesses Stryker (R. 759-61), Tagg (R. 768-70, 772), Wood (R. 778) and Laverty (R. 784) is undisputed to the effect that there is no such thing in the live stock commission business as normal selling performance; that the number of cars sold per year is neither the measure of the employed salesman's value, nor is the character of the livestock commission business such as to permit such a method of cost accounting. Witness Shortell, who directed the making of the government's audits (Ex. 7-65, R. 400-699) declined (R. 320, 348-53-357) to express any opinion as to salaries being too large or too small, and that cost of selling from his point of view would have to be computed entirely upon the figures shown by the books.

It therefore becomes of some importance to test the application of these theoretical selling salaries to the actual operation of appellants' business during the year selected as a test year. This is done in Exhibit 104 (R. 798). There, purely as a means of testing the results of this salary schedule in actual operation, all owners' salaries are eliminated, whether more or less

than the amount found to be the normal salary of an ordinarily efficient salesman, these amounts substituted as salaries for resident owners. Employee salesmen's salaries are left as they appear in Exhibits 7-65. On this basis the total selling salaries for the 56 firms covered by Exhibit 104 is $424,333.33 for resident owners and $417,916.82 for employee salesman, or a total of $842,250.15.

The substitution in the accounting shown by Exhibits 7-65 of the Secretary's normal selling salaries, leaving other expenses exactly as shown by the books, results in a total cost to all the appellants of conducting their business of $2,036,722.02, resulting in a deficit to all the petitioners, as shown in Exhibit 105, (R. 798) of $53,288.60, or of $115,450.79, if the increase on sales to traders and speculators authorized in the Secretary's order is excluded, as the undisputed evidence would require it to be. Exhibit 105 also shows the result as to each of the individual petitioners and indicates that of the fifty-six firms covered by the exhibit only twenty would realize profits on the one basis and only fifteen on the other. These results are put on a per car basis in Exhibit 111 (R. 798) showing a per car deficit of 42 cents on the one basis and 91 cents on the other, considering the firms as a whole, with per car deficits running far beyond such average in a large number of individual cases.

If it be objected that these exhibits do not fairly apply the Secretary's "normal" to the business of appellants because such "normal" is there applied, regardless of the actual volume of sales, the comparison

between the Secretary's theoretical normal and the actual facts can be carried farther, by computing per car selling cost on the basis of actual owners' salaries and actual employees' salaries. In the following table this is done on two bases: that of actual selling salaries, in which salaries paid owner-salesmen are used, except that in the cases of 10 or 11 firms where no salaries for owners appear on the books, the government's "normal" is adopted; and "Basis B", in which all owners' salaries in excess of the Secretary's "normal" are reduced to those figures, while smaller owners' salaries are taken from the books. This basis is modified in one or two instances where the volume handled by the firm is low; for example, in firm 16 (Exhibit 22, R. 477) owners' salaries are divided in two on account of the low volume. Likewise in firm 51 the sole owner's drawing account of $2,025 is allowed to stand, although a "normal salary" of $4,000.00 would raise his per car selling cost on hogs to $4.49 instead of the $2.70 shown. In all cases commissions paid as salaries, (for example, Exhibit 53, R. 634), are excluded.

On that basis the per car selling costs for the fifty-six firms, for the several species and for all species, with the totals and averages for the entire market, are as follows:

PER CAR SELLING COS

Firm No.	OWNER - SALESMEN SALARIES ACTUAL Cattle	Hogs	Sheep	Total	OWNER - SALESMEN SALARIES BASIS B Cattle	Hogs	Sheep	Total	EMPLO Cattle	Ho
1	$ 9,000.00	$ 7,000.00	$	$16,000.00	$ 5,000.00	$ 4,000.00	$	$ 9,000.00	$ 5,700.00	$ 2,1
2	9,000.00			9,000.00	8,000.00			8,000.00		2,7
*3		4,000.00		4,000.00		4,000.00		4,000.00	10,380.00	
4	10,200.00	2,500.00		12,700.00	9,200.00	2,500.00		11,700.00	4,825.00	3,71
*5	5,000.00	4,000.00		9,000.00	5,000.00	4,000.00		9,000.00	2,640.00	
6	12,180.00	7,320.00		19,500.00	9,380.00	7,320.00		16,700.00		2,4
7			7,000.00	7,000.00			5,000.00	5,000.00		
8	9,000.00			9,000.00	9,000.00			9,000.00	6,000.00	5,62
9	21,600.00			21,600.00	10,000.00			10,000.00	7,475.00	3,6
10	1,800.00	1,375.00		3,175.00	1,800.00	1,375.00		3,175.00	3,000.00	
*11	2,500.00	2,000.00		4,500.00	2,500.00	2,000.00		4,500.00	1,500.00	
12	7,889.30			7,889.30	7,889.30			7,889.30	2,621.45	2,2
*13	19,200.00			19,200.00	10,000.00			10,000.00	10,277.49	6,6
14	3,600.00			3,600.00	3,600.00			3,600.00	13,680.03	5,81
15	1,800.00			1,800.00	1,800.00			1,800.00	4,200.00	2,1
16	5,000.00	4,000.00		9,000.00	2,500.00	2,000.00		4,500.00		
*17	3,750.00			3,750.00	3,750.00			3,750.00		
*18									19,300.00	3,6
19	6,000.00	5,400.00		11,400.00	5,000.00	4,000.00		9,000.00	4,870.00	2,34
20	3,000.00	3,000.00		6,000.00	3,000.00	3,000.00		6,000.00	2,400.00	
21	8,200.00			8,200.00	8,200.00			8,200.00		1,8
22	11,700.00	8,250.00		19,950.00	5,000.00	7,000.00		12,000.00	10,400.00	2,1
23									13,751.13	4,5
24	2,650.00	2,650.00		5,300.00	2,650.00	2,650.00		5,300.00		
*25	4,800.00	4,800.00		9,600.00	4,800.00	4,800.00		9 600.00	3,600.00	3,76
27	9,300.00			9,300.00	8,300.00			8,300.00	2,875.00	2,68
*28	4,999.92	10,800.00		15,799 92	4,999.92	4,000.00		8,999.92	15,600.00	4
29		4,000.00		4,000.00		4,000.00		4,000.00	9,800.00	2,79
30	10,800.00			10,800.00	10,000.00			10,000.00	2,400.00	7,93
*31									15,879.17	7,99
33	5,000.00			5,000.00	2,500.00			2,500.00	1,600.00	4,80
*34									13,800.00	6,72
35	6,000.00			6,000.00	5,000.00			5,000.00	3,037.50	3,00
36			5,000.00	5,000.00			2,500.00	2,500.00		
37	4,080.00			4,080.00	4,080.00			4 080.00	750.00	1,68
38		7,200.00		7,200.00		4,000.00		4,000.00	5,983.52	
39	11,100.00	7,200.00		18,300.00	8,000.00	4,000.00		12,000 00	7,550 00	4,50
40	4,800.00	4,800.00	4,800.00	14,400.00	4,800.00	4,800.00	4,800.00	14,400.00	3,000.00	
41	5,000.00			5,000.00	5,000.00			5 000.00		
42	10,000.00	4,000.00		14,000.00	10,000.00	4,000.00		14 000.00		
*43	10,800.00			10,800.00	5,000.00			5,000.00	10,500.00	5,62
44	6,000.00			6,000.00	5,000.00			5,000.00	3,000.00	3,90
45		3,333.00		3,333.00		2,666.66		2 666 66	3,600.00	1,03
46	4,416.66			4,416.66	4,416.66			4 416.66	13,408.33	6,12
47		2,750.00		2,750.00		2,750.00		2,750.00	4,555 00	
*48	17,700.00	6,600.00	6,600.00	30,900.00	13,300.00	4,000.00	5,000.00	22 300.00	4,950.00	2,40
49			6,300.00	6,300.00			6,300.00	6,300.00		
51		2,025.00		2,025.00		2,025.00		2,025.00	4,720.00	1,76
52		4,800.00		4,800.00		4,000.00		4,000.00	6,300.00	3,60

Firm No.	OWNER - SALESMEN SALARIES ACTUAL Cattle	Hogs	Sheep	Total	OWNER - SALESMEN SALARIES BASIS B Cattle	Hogs	Sheep	Total	EMPLOYEE - S SALARI Cattle	Hogs	
1	$ 9,000.00	$ 7,000.00	$	$16,000.00	$ 5,000.00	$ 4,000.00	$	$ 9,000.00	$ 5,700.00	$ 2,100.00	$
2	9,000.00			9,000.00	8,000.00			8,000.00		2,700.00	
*3		4,000.00		4,000.00		4,000.00		4,000.00	10,380.00		
4	10,200.00	2,500.00		12,700.00	9,200.00	2,500.00		11,700.00	4,825.00	3,710.00	
*5	5,000.00	4,000.00		9,000.00	5,000.00	4,000.00		9,000.00	2,640.00		
6	12,180.00	7,320.00		19,500.00	9,380.00	7,320.00		16,700.00		2,400.00	
7			7,000.00	7,000.00			5,000.00	5,000.00			
8	9,000.00			9,000.00	9,000.00			9,000.00	6,000.00	5,625.00	
9	21,600.00			21,600.00	10,000.00			10,000.00	7,475.00	3,600.00	
10	1,800.00	1,375.00		3,175.00	1,800.00	1,375.00		3,175.00	3,000.00		
*11	2,500.00	2,000.00		4,500.00	2,500.00	2,000.00		4,500.00	1,500.00		
12	7,889.30			7,889.30	7,889.30			7,889.30	2,621.45	2,287.88	
*13	19,200.00			19,200.00	10,000.00			10,000.00	10,277.49	6,600.00	10
14	3,600.00			3,600.00	3,600.00			3,600.00	13,680.03	5,816.78	
15	1,800.00			1,800.00	1,800.00			1,800.00	4,200.00	2,100.00	
16	5,000.00	4,000.00		9,000.00	2,500.00	2,000.00		4,500.00			
*17	3,750.00			3,750.00	3,750.00			3,750.00			
*18									19,300.00	3,600.00	9
19	6,000.00	5,400.00		11,400.00	5,000.00	4,000.00		9,000.00	4,870.00	2,340.00	
20	3,000.00	3,000.00		6,000.00	3,000.00	3,000.00		6,000.00	2,400.00		
21	8,200.00			8,200.00	8,200.00			8,200.00		1,800.00	
22	11,700.00	8,250.00		19,950.00	5,000.00	7,000.00		12,000.00	10,400.00	2,100.00	
23									13,751.13	4,505.99	4
24	2,650.00	2,650.00		5,300.00	2,650.00	2,650.00		5,300.00			
*25	4,800.00	4,800.00		9,600.00	4,800.00	4,800.00		9 600.00	3,600.00	3,767.50	
27	9,300.00			9,300.00	)			8,300.00	2,875.00	2,687.50	
*28						4,000.00		8,999.92	15,600.00	44.44	6,
29	FOLD OUT IS TOO LARGE TO BE FILMED					4,000.00		4,000.00	9,800.00	2,795.00	
30					)			10,000.00	2,400.00	7,937.50	
*31									15,879.17	7,999.92	
33				5,000.00	2,500.00			2,500.00	1,600.00	4,800.00	
*34									13,800.00	6,720.00	
35	6,000.00			6,000.00	5,000.00			5,000.00	3,037.50	3,000.00	
36			5,000.00	5,000.00			2,500.00	2,500.00			
37	4,080.00			4,080.00	4,080.00			4 080.00	750.00	1,680.00	
38		7,200.00		7,200.00		4,000.00		4,000.00	5,983.52		5,0
39	11,100.00	7,200.00		18,300.00	8,000.00	4,000.00		12,000.00	7,550.00	4,500.00	
40	4,800.00	4,800.00	4,800.00	14,400.00	4,800.00	4,800.00	4,800.00	14,400.00	3,000.00		
41	5,000.00			5,000.00	5,000.00			5,000.00			
42	10,000.00	4,000.00		14,000.00	10,000.00	4,000.00		14 000.00			
*43	10,800.00			10,800.00	5,000.00			5,000.00	10,500.00	5,625.00	2,8
44	6,000.00			6,000.00	5,000.00			5,000.00	3,000.00	3,900.00	
45		3,333.00		3,333.00		2,666.66		2 666 66	3,600.00	1,030.00	
46	4,416.66			4,416.66	4,416.66			4 416.66	13,408.33	6,120.00	
47		2,750.00		2,750.00		2,750.00		2,750.00	4,555.00		
*48	17,700.00	6,600.00	6,600.00	30,900.00	13,300.00	4,000.00	5,000.00	22 300.00	4,950.00	2,400.00	
49			6,300.00	6,300.00			6,300.00	6,300.00			
51		2,025.00		2,025.00		2,025.00		2,025.00	4,720.00	1,760.00	
52		4,800.00		4,800.00		4 000.00		4 000.00	6 300.00	3,600.00	
53	10,875.00	6,000.00		16,875.00	9,875.00	4,000.00		13,875.00	1,840.00		
54			4,800.00	4,800.00			4,800.00	4 800.00	4,720.00	2,140.00	
56	3,600.00	3,000.00		6,600.00	3 600.00	3,000.00		6 600.00	4,571.65		
57	6,000.00			6,000.00	6 000.00			6,000.00		2,1 .00	
58	10,400.00			10,400.00	9,200.00			9,200.00	2,400.00	4,2 .00	
60	2,405.29			2,405.29	2,405.29			2,405.29			

(TABLE A HERE)

These results are no less striking in their variance from the Secretary's "normal" when applied to the firms having the greater "opportunity to display their ability," as discussed in the Secretary's order (R. 33). The 55 firms shown in the foregoing table handled a total of 127,064.76 cars, or an average of 2310.27 per firm per year. The following table, therefore, tabulates per car selling cost on both the "actual basis" and "Basis B" for firms handling 2,000 or more cars per year, adding thereto such firms as Nos. 6, 7 and 58 (R. 425, 432, 690), which come within a few cars of that minimum and are otherwise more or less normal in their volume and operation.

OVER 200

Firm No.	Cattle	OWNER - SALESMEN SALARIES ACTUAL Hogs	Sheep	Total	
1	$ 9,000.00	$ 7,000.00	$.....	$16,000.00	$
4	10,200.00	2,500.00	.....	12,700.00	
6	12,180.00	7,320.00	.....	19,500.00	
7	.....	.....	7,000.00	7,000.00	
8	9,000.00	.....	.....	9,000.00	
9	21,600.00	.....	.....	21,600.00	1
13	19,200.00	.....	.....	19,200.00	1
14	3,600.00	.....	.....	3,600.00	
18	.....	.....	.....	.....	
19	6,000.00	5,400.00	.....	11,400.00	
22	11,700.00	8,250.00	.....	19,950.00	
23	.....	.....	.....	.....	
25	4,800.00	4,800.00	.....	9,600.00	
27	9,300.00	.....	.....	9,300.00	
28	4,999.92	10,800.00	.....	15,799.92	
29	.....	4,000.00	.....	4,000.00	
30	10,800.00	.....	.....	10,800.00	1
31	.....	.....	.....	.....	
34	.....	.....	.....	.....	
38	.....	7,200.00	.....	7,200.00	
39	11,100.00	7,200.00	.....	18,300.00	
40	4,800.00	4,800.00	4,800.00	14,400.00	
43	10,800.00	.....	.....	10,800.00	
46	4,416.66	.....	.....	4,416.66	
48	17,700.00	6,600.00	6,600.00	30,900.00	1
56	3,600.00	3,000.00	.....	6,600.00	
58	10,400.00	.....	.....	10,400.00	
	$195,196.58	$78,870.00	$18,400.00	$292,466.58	$14

OVER 2000 CARS—PER CAR SELLING COST 1925

SALESMEN'S ACTUAL		OWNER - SALESMEN SALARIES BASIS B				EMPLOYEE - SALESMEN SALARIES				TOTAL SELL AC	
Sheep	Total	Cattle	Hogs	Sheep	Total	Cattle	Hogs	Sheep	Total	Cattle	Hogs
$.....	$16,000.00	$ 5,000.00	$ 4,000.00	$.....	$ 9,000.00	$ 5,700.00	$ 2,100.00	$.....	$ 7,800.00	$14,700.00	$ 9,100.00
.....	12,700.00	9,200.00	2,500.00	.....	11,700.00	4,825.00	3,710.00	.....	8,535.00	15,025.00	6,210.00
.....	19,500.00	9,380.00	7,320.00	.....	16,700.00	.....	2,400.00	.....	2,400.00	12,180.00	9,720.00
7,000.00	7,000.00	.....	.....	5,000.00	5,000.00	.....	.....	2,700.00	2,700.00	.....	.....
.....	9,000.00	9,000.00	.....	.....	9,000.00	6,000.00	5,625.00	3,300.00	14,925.00	15,000.00	5,625.00
.....	21,600.00	10,000.00	.....	.....	10,000.00	7,475.00	3,600.00	2,100.00	13,175.00	29,075.00	3,600.00
.....	19,200.00	10,000.00	.....	.....	10,000.00	10,277.49	6,600.00	10,448.28	27,325.77	29,477.49	6,600.00
.....	3,600.00	3,600.00	.....	.....	3,600.00	13,680.03	5,816.78	.....	19,496.81	17,280.03	5,816.78
.....	.....	.....	.....	.....	.....	19,300.00	3,600.00	9,700.00	32,600.00	19,300.00	3,600.00
.....	11,400.00	5,000.00	4,000.00	.....	9,000.00	4,870.00	2,340.00	.....	7,210.00	10,870.00	7,740.00
.....	19,950.00	5,000.00	7,000.00	.....	12,000.00	10,400.00	2,100.00	.....	12,500.00	22,100.00	10,350.00
.....	.....	.....	.....	.....	.....	13,751.13	4,505.99	4,206.22	22,463.34	13,751.13	4,505.99
.....	9,600.00	4,800.00	4,800.00	.....	9,600.00	3,600.00	3,767.50	.....	7,367.50	8,400.00	8,567.50
.....	9,300.00	8,300.00	.....	.....	8,300.00	2,875.00	2,687.50	.....	5,562.50	12,175.00	2,687.50
.....	15,799.92	4,999.92	4,000.00	.....	8,999.92	15,600.00	44.44	6,227.46	21,871.90	20,599.92	10,844.44
.....	4,000.00	.....	4,000.00	.....	4,000.00	9,800.00	2,795.00	.....	12,595.00	9,800.00	6,795.00
.....	10,800.00	10,000.00	.....	.....	10,000.00	2,400.00	7,937.50	.....	10,337.50	13,200.00	7,937.50
.....	.....	.....	.....	.....	.....	15,879.17	7,999.92	225.00	24,104.09	15,879.17	7,999.92
.....	.....	.....	.....	.....	.....	13,800.00	6,720.00	.....	20,520.00	13,800.00	6,720.00
.....	7,200.00	.....	4,000.00	.....	4,000.00	5,983.52	.....	5,000.00	10,983.52	5,983.52	7,200.00
.....	18,300.00	8,000.00	4,000.00	.....	12,000.00	7,550.00	4,500.00	.....	12,050.00	18,650.00	11,700.00
4,800.00	14,400.00	4,800.00	4,800.00	4,800.00	14,400.00	3,000.00	.....	.....	3,000.00	7,800.00	4,800.00
.....	10,800.00	5,000.00	.....	.....	5,000.00	10,500.00	5,625.00	2,810.00	18,935.00	21,300.00	5,625.00
.....	4,416.66	4,416.66	.....	.....	4,416.66	13,408.33	6,120.00	.....	19,528.33	17,824.99	6,120.00
6,600.00	30,900.00	13,300.00	4,000.00	5,000.00	22,300.00	4,950.00	2,400.00	.....	7,350.00	22,650.00	9,000.00
.....	6,600.00	3,600.00	3,000.00	.....	6,600.00	4,571.65	.....	.....	4,571.65	8,171.65	3,000.00
.....	10,400.00	9,200.00	.....	.....	9,200.00	2,400.00	4,740.00	.....	7,140.00	12,800.00	4,740.00
$18,400.00	$292,466.58	$142,596.58	$57,420.00	$14,800.00	$214,816.58	$22,596.32	$97,734.63	$46,716.96	$357,047.91	$407,792.90	$176,604.63

OVER 2000 CARS—PER CAR

TOTAL SELLING SALARIES ACTUAL				TOTAL SELLING SALARIES BASIS B				CARS HANDLED			
Cattle	Hogs	Sheep	Total	Cattle	Hogs	Sheep	Total	Cattle and Calves	Hogs	Sheep	Total
$14,700.00	$ 9,100.00	$.....	$23,800.00	$10,700.00	$ 6,100.00	$.....	$16,800.00	1,233.31	1,186.44	27.24	2,446.9
15,025.00	6,210.00	.....	21,235.00	14,025.00	6,210.00	.....	20,235.00	2,489.08	1,658.66	58.64	4,206.3
12,180.00	9,720.00	.....	21,900.00	9,380.00	9,720.00	.....	19,100.00	1,481.88	416.98	8.86	1,907.7
.....	.....	9,700.00	9,700.00	.....	.....	7,700.00	7,700.00	.....	.....	1,917.12	1,917.1
15,000.00	5,625.00	3,300.00	23,925.00	15,000.00	5,625.00	3,300.00	23,925.00	3,538.86	1,299.75	412.74	5,251.3
29,075.00	3,600.00	2,100.00	34,775.00	17,475.00	3,600.00	2,100.00	23,175.00	2,602.44	1,876.73	130.49	4,609.6
29,477.49	6,600.00	10,448.28	46,525.77	20,277.49	6,600.00	10,448.28	37,325.77	4,141.91	1,183.00	1,222.26	6,547.1
17,280.03	5,816.78	.....	23,096.81	17,280.03	5,816.78	.....	23,096.81	1,484.70	1,254.06	11.62	2,750.3
19,300.00	3,600.00	9,700.00	32,600.00	19,300.00	3,600.00	9,700.00	32,600.00	3,061.39	1,134.54	2,204.79	6,400.7
10,870.00	7,740.00	.....	18,610.00	9,870.00	6,340.00	.....	16,210.00	933.79	1,199.95	5.00	2,138.7
22,100.00	10,350.00	.....	32,450.00	15,400.00	9,100.00	.....	24,500.00	2,070.29	1,301.09	135.01	3,506.3
13,751.13	4,505.99	4,206.22	22,463.34	13,751.13	4,505.99	4,206.22	22,463.34	937.18	797.30	682.37	2,416.8
8,400.00	8,567.50	.....	16,967.50	8,400.00	8,567.50	.....	16,967.50	712.34	1,811.57	10.48	2,534.3
12,175.00	2,687.50	.....	14,862.50	11,175.00	2,687.50	.....	13,862.50	1,767.04	328.08	14.16	2,109.2
20,599.92	10,844.44	6,227.46	37,671.82	20,599.92	4,044.44	6,227.46	30,871.82	3,215.80	1,820.78	421.69	5,458.2
9,800.00	6,795.00	.....	16,595.00	9,800.00	6,795.00	.....	16,595.00	1,355.39	765.10	13.89	2,134.3
13,200.00	7,937.50	.....	21,137.50	12,400.00	7,937.50	.....	20,337.50	2,389.39	1,556.79	6.07	3,952.2
15,879.17	7,999.92	225.00	24,104.09	15,879.17	7,999.92	225.00	24,104.09	1,784.34	1,071.59	63.14	2,919.0
13,800.00	6,720.00	.....	20,520.00	13,800.00	6,720.00	.....	20,520.00	1,701.90	1,720.89	63.62	3,486.4
5,983.52	7,200.00	5,000.00	18,183.52	5,983.52	4,000.00	5,000.00	14,983.52	841.70	1,581.93	380.08	2,803.7
18,650.00	11,700.00	.....	30,350.00	15,550.00	8,500.00	.....	24,050.00	4,239.91	2,311.39	21.10	6,572.4
7,800.00	4,800.00	4,800.00	17,400.00	7,800.00	4,800.00	4,800.00	17,400.00	758.79	938.26	537.15	2,234.2
21,300.00	5,625.00	2,810.00	29,735.00	15,500.00	5,625.00	2,810.00	23,935.00	2,463.85	2,333.75	275.52	5,073.1
17,824.99	6,120.00	.....	23,944.99	17,824.99	6,120.00	.....	23,944.99	2,043.49	1,069.06	150.78	3,263.3
22,650.00	9,000.00	6,600.00	38,250.00	18,250.00	6,400.00	5,000.00	29,650.00	2,787.78	1,281.19	1,063.06	5,132.0
8,171.65	3,000.00	.....	11,171.65	8,171.65	3,000.00	.....	11,171.65	1,855.35	507.42	3.20	2,365.9
12,800.00	4,740.00	.....	17,540.00	11,600.00	4,740.00	.....	16,340.00	1,748.11	228.99	21.13	1,998.2
$07,792.90	$176,604.63	$65,116.96	$649,514.49	$355,192.90	$155,154.63	$61,516.96	$571,864.49	53,640.01	32,635.29	9,861.21	96,136.5

R CAR SELLING COST 1925

DLED		SELLING SALARIES PER CAR ACTUAL				SELLING SALARIES PER CAR BASIS B			
Sheep	Total	Cattle	Hogs	Sheep	All Species	Cattle	Hogs	Sheep	All Species
27.24	2,446.99	$11.91	$ 7.77	$ ——	$ 9.72	$ 8.67	$ 5.14	$ ——	$ 6.82
58.64	4,206.38	6.03	3.74	——	5.04	5.63	3.74	——	4.80
8.86	1,907.72	8.21	23.28	——	11.42	6.32	23.28	——	10.01
1,917.12	1,917.12	——	——	5.11	5.11	——	——	4.01	4.01
412.74	5,251.35	4.23	4.32	8.00	4.55	4.23	4.32	8.00	4.55
130.49	4,609.66	11.17	1.91	16.09	7.54	6.71	1.91	16.09	5.02
1,222.26	6,547.17	7.11	5.57	8.54	7.15	4.89	5.57	8.54	5.70
11.62	2,750.38	11.63	4.63	——	8.39	11.63	4.63	——	8.39
2,204.79	6,400.72	6.30	3.17	4.39	5.09	6.30	3.17	4.39	5.09
5.00	2,138.74	11.64	6.45	——	8.70	10.57	5.29	——	7.57
135.01	3,506.39	10.67	7.95	——	9.22	7.48	6.99	——	6.98
682.37	2,416.85	14.67	5.65	6.16	9.29	14.67	5.65	6.16	9.29
10.48	2,534.39	11.79	4.72	——	6.69	11.79	4.72	——	6.69
14.16	2,109.28	6.89	8.19	——	7.04	6.32	8.19	——	6.57
421.69	5,458.27	6.40	5.95	14.76	6.90	6.40	2.22	14.76	5.47
13.89	2,134.38	7.23	8.88	——	7.77	7.23	8.88	——	7.77
6.07	3,952.25	5.52	5.09	——	5.34	5.19	5.09	——	5.14
63.14	2,919.07	8.89	7.40	3.56	8.22	7.21	7.40	3.56	7.22
63.62	3,486.41	8.16	3.90	——	5.91	8.16	3.90	——	5.91
380.08	2,803.71	7.06	4.48	13.15	6.48	7.06	4.48	13.15	6.48
21.10	6,572.40	4.39	5.06	——	4.61	3.69	4.11	——	3.81
537.15	2,234.20	10.27	5.11	8.91	7.78	10.27	5.11	8.91	7.78
275.52	5,073.12	8.64	2.41	10.19	5.86	6.29	2.41	10.19	4.71
150.78	3,263.33	8.72	5.72	——	7.33	8.72	5.72	——	7.33
1,063.06	5,132.03	8.12	7.01	6.20	7.45	6.54	4.99	4.68	5.77
3.20	2,365.97	4.40	5.91	——	4.67	4.40	5.91	——	4.67
21.13	1,998.23	7.32	20.69	——	8.77	6.63	20.69	——	8.17
9,861.21	96,136.51	7.60	5.41	6.60	6.75	6.62	4.75	6.23	5.94

(TABLE B HERE)

In most firms owners act as salesmen, and the question arises whether there can be any such thing as a "normal salary" for such owner. But in the case of four branch firms, Nos. 18, 23, 31 and 34, salaries are fixed by bargaining and the selling cost per car is as follows:

	EMPLOYEE - SALESMEN SALARIES				
Firm No.	Cattle	Hogs	Sheep	Total	
18	$19,300.00	$ 3,600.00	$ 9,700.00	$32,600.00	$
23	13,751.13	4,505.99	4,206.22	22,463.34	
31	15,879.17	7,999.92	225.00	24,104.09	
34	13,800.00	6,720.00	.....	20,520.00	
	$62,730.30	$22,825.91	$14,131.22	$99,687.43	$

BRANCHES

Total	TOTAL SELLING SALARIES ACTUAL				CARS HANDLED				SELLING SALARIES PER CAR ACTUAL			
	Cattle	Hogs	Sheep	Total	Cattle and Calves	Hogs	Sheep	Total	Cattle	Hogs	Sheep	All Species
2,600.00	$19,300.00	$ 3,600.00	$ 9,700.00	$32,600.00	3,061.39	1,134.54	2,204.79	6,400.72	6.30	3.17	4.39	5.09
2,463.34	13,751.13	4,505.99	4,206.22	22,463.34	937.18	797.30	682.37	2,416.85	14.67	5.65	6.16	9.29
4,104.09	15,879.17	7,999.92	225.00	24,104.09	1,784.34	1,071.59	63.14	2,919.07	8.89	7.40	3.56	8.22
0,520.00	13,800.00	6,720.00	.....	20,520.00	1,701.90	1,720.89	63.62	3,486.41	8.16	3.90	.....	5.91
9,687.43	$62,730.30	$22,825.91	$14,131.22	$99,687.43	7,484.81	4,724.32	3,013.92	15,223.05	8.38	4.83	4.68	6.54

From Schedule No. 1, attached to each of Exhibits 7-65, we can ascertain the number of owner and employee salesmen and arrive at the average sales per year for each salesman, for each firm and for each of the three species. These averages, with the average for each species, both as to each of the 56 firms included in Exhibit 104 and to the firms as a whole, are as follows:

Firm No.	OWNER - SALESMEN Cattle	Hogs	Sheep	EMPLOYEE-SALESMEN Cattle	Hogs	Sheep	Cattl
1	1	1	.....	2	1	.....	3
2	2	.....	.....	.....	1	.....	2
3	2	1	.....	1	1/2	.....	3
4	2	1/2	.....	2	1 1/2	.....	4
5	1	1	.....	1 1/2	.....	.....	2 1/2
6	2	2	.....	1	.....	.....	3
7	.....	.....	1	.....	.....	1	.....
8	2	.....	.....	1 1/2	2	1	3 1/2
9	2	1	.....	1 2/3	1	1	3 2/3
10	1	1	.....	2	.....	.....	3
11	1/2	1/2	.....	1/2	1	.....	1
12	2	.....	.....	1	1 1/2	.....	3
13	2	.....	.....	2	2	2	4
14	1	.....	.....	3	1	.....	4
15	1	.....	.....	2	1	.....	3
16	1	1	.....	.....	.....	.....	1
17	1/2	.....	.....	1/2	.....	.....	1
18	.....	.....	.....	5	1	2	5
19	1	1	.....	2	1	.....	3
20	1	1	.....	1	.....	.....	2
21	2	.....	.....	.....	1	.....	2
22	1	2	.....	3	1	.....	4
23	.....	.....	.....	3	1	1	3
24	1	1	.....	.....	.....	.....	1
25	1	1	.....	1	1 1/2	.....	2
27	2	.....	.....	1 1/5	1 1/6	.....	3 1/5
28	1	1	.....	4 5/12	1	2	5 5/12
29	.....	1/2	.....	2	1	.....	2
30	2	.....	.....	1	2	.....	3
31	.....	.....	.....	3 1/2	1 3/4	.....	3 1/2
32	1 1/2	.....	.....	.....	5/6	.....	1 1/2
33	9/10	.....	.....	3/4	2	.....	1 13/2
34	.....	.....	.....	4	2	.....	4
35	1	.....	.....	1 7/24	1	.....	2 7/24
36	.....	.....	1	.....	.....	.....	.....
37	1	.....	.....	3/4	1	.....	1 3/4
38	.....	1	.....	2	.....	1	2
39	1 5/12	1	.....	3	2	.....	4 5/12
40	1	1	1	2	.....	.....	3
41	2	.....	.....	.....	.....	.....	2
42	2	1	.....	.....	.....	.....	2
43	1	.....	.....	3	1 11/12	1	4
44	1	.....	.....	2	2	.....	3
45	2/3	.....	.....	1	5/12	.....	1 2/3
46	11/12	.....	.....	3 5/6	2	.....	4 3/4
47	.....	1	.....	2	.....	.....	2
48	3	1	1	2	1	.....	5
49	.....	.....	1 3/4	.....	5/12	.....	.....
51	.....	.....	.....	1 5/6	1	.....	1 5/6
52	.....	1	.....	2	1	.....	

SMEN	TOTAL SALES FORCE				CARS HANDLED				AVERAGE PER SALESMAN			
Sheep	Cattle	Hogs	Sheep	All Species	Cattle and Calves	Hogs	Sheep	All Species Total	Cattle	Hogs	Sheep	All Species General
.....	3	2	.....	5	1,233.31	1,186.44	27.24	2,446.99	411.10	593.22	.....	489.39
.....	2	1	.....	3	830.79	398.03	4.24	1,233.06	415.38	398.03	.....	411.02
.....	3	1 1/2	.....	4 1/2	657.56	1,068.92	11.91	1,738.39	219.19	712.60	.....	386.31
.....	4	2	.....	6	2,489.08	1,658.66	58.64	4,206.38	622.27	829.33	.....	701.06
.....	2 1/2	1	.....	3 1/2	726.73	516.37	12.69	1,255.79	290.69	516.37	.....	358.79
.....	3	2	.....	5	1,481.88	416.98	8.86	1,907.72	493.96	208.49	.....	381.54
1	.....	.....	2	2	.....	.....	1,917.12	1,917.12	.....	.....	958.56	958.56
1	3 1/2	2	1	6 1/2	3,538.86	1,299.75	412.74	5,251.35	1,011.01	649.87	412.74	807.90
1	3 2/3	2	1	6 2/3	2,602.44	1,876.73	130.49	4,609.66	709.75	938.36	130.49	691.44
.....	3	1	.....	4	1,027.75	145.83	8.22	1,181.80	342.92	145.83	.....	295.45
.....	1	1 1/2	.....	2 1/2	500.05	278.53	1.22	779.80	500.05	557.06	.....	519.86
.....	3	1 1/2	.....	4 1/2	844.30	277.61	4.18	1,126.09	281.43	185.07	.....	250.24
2	4	2	2	8	4,141.91	1,183.00	1,222.26	6,547.17	1,035.47	591.50	611.13	818.39
.....	4	1	.....	5	1,484.70	1,254.06	11.62	2,750.38	371.17	1,254.06	.....	550.07
	3	1	.....	4	577.49	522.78	4.82	1,105.09	192.49	522.78	.....	276.27
	1	1	.....	2	144.22	274.27	.18	418.67	144.22	274.27	.....	209.33
	1	.....	.....	1	488.38	55.68	.46	544.52	488.38	.....	.....	544.52
	5	1	2	8	3,061.39	1,134.54	2,204.79	6,400.72	612.28	1,134.54	1,102.38	800.09
	3	2	.....	5	933.79	1,199.95	5.00	2,138.74	311.26	599.97	.....	427.75
	2	1	.....	3	667.46	759.55	23.54	1,450.55	333.73	759.55	.....	483.52
	2	1	.....	3	860.15	243.65	27.74	1,131.54	430.07	243.65	.....	377.18
	4	3	.....	7	2,070.29	1,301.09	135.01	3,506.39	514.06	433.69	.....	500.91
	3	1	1	5	937.18	797.30	682.37	2,416.85	312.39	797.30	682.37	483.37
	1	1	.....	2	146.87	328.88	2.26	478.01	146.87	328.88	.....	239.00
	2	2 1/2	.....	4 1/2	712.34	1,811.57	10.48	2,534.39	356.17	724.63	.....	562.75
	3 1/5	1 1/6	.....	4 11/30	1,767.04	328.08	14.16	2,109.28	552.20	281.61	.....	483.78
	5 5/12	2	2	9 5/12	3,215.80	1,820.78	421.69	5,458.27	596.76	910.39	210.84	579.42
	2	1 1/2	.....	3 1/2	1,355.39	765.10	13.89	2,134.38	677.69	510.06	.....	609.82
	3	2	.....	5	2,389.39	1,556.79	6.07	3,952.25	796.46	778.38	.....	790.45
	3 1/2	1 3/4	.....	5 1/4	1,784.34	1,071.59	63.14	2,919.07	509.81	612.34	.....	556.01
	1 1/2	5/6	.....	2 1/6	620.26	122.19	4.78	747.23	413.51	146.63	.....	320.24
	1 13/20	2	.....	3 13/20	533.67	593.37	3.05	1,130.09	323.43	296.68	.....	309.61
	4	2	.....	6	1,701.90	1,720.89	63.62	3,486.41	425.47	860.44	.....	581.07
	2 7/24	1	.....	3 7/24	637.97	802.46	7.08	1,447.51	278.33	802.46	.....	439.73
	.....	.....	1	1	4.05	3.72	241.72	249.49	.....	.....	241.72	249.49
	1 3/4	1	.....	2 3/4	655.37	247.56	7.91	910.84	374.49	247.56	.....	331.21
	2	1	1	4	841.70	1,581.93	380.08	2,803.71	420.85	1,581.93	380.08	700.93
	4 5/12	3	.....	7 5/12	4,239.91	2,311.39	21.10	6,572.40	959.80	770.46	.....	885.04
	3	1	1	5	758.79	938.26	537.15	2,234.20	252.93	938.26	537 15	446.84
	2	.....	.....	2	1,157.65	98.86	3.69	1,260.20	578.82	.....	.....	630.10
	2	1	.....	3	672.83	873.91	2.24	1,548.98	336.41	873.91	.....	516.32
	4	1 11/12	1	6 11/12	2,463.85	2,333.75	275.52	5,073.12	615.96	1,216.30	275.52	733.46
	3	2	.....	5	1,211.16	424.40	12.56	1,648.12	403.88	212.20	.....	329.62
.....	1 2/3	5/12	.....	2 1/12	686.57	212.17	8.62	907.36	411.54	509.21	.....	291.53
.....	4 3/4	2	.....	6 3/4	2,043.49	1,069.06	150.78	3,263.33	430.21	534.53	.....	483.45
.....	2	1	.....	3	441.26	548.39	5.04	994.69	441.26	274.19	.....	331.56
.....	5	2	1	8	2,787.78	1,281.19	1,063.06	5,132.03	557.55	640.59	1,063.06	641.50
.....	.....	5/12	1 3/4	2 1/6	.....	1.00	306.38	307.38	.....	.....	175.07	.....
.....	1 5/6	2	.....	3 5/6	449.07	1,400.45	2.64	1,852.16	244.94	700.22	.....	483.17
.....	2	2	.....	4	761.68	1,115.87	23.60	1,901.15	380.84	557.93	.....	475.28
.....	3	1	.....	4	1,113.10	681.08	4.34	1,798.52	371.03	681.08	.....	449.63
.....	2 1/6	1	1	4 1/6	495.46	244.16	142.49	882.11	228.67	244.16	142.49	211.71
.....	2 7/24	1	.....	3 7/24	1,855.35	507.42	3.20	2,365.97	809.42	507.42	.....	718.77
.....	2	7/10	.....	2 7/10	507.61	317.59	8.43	833.63	253.80	453.70	.....	308.75

FOLD OUT IS TOO LARGE TO BE FILMED

7-6
sa
ea
sp
sp
hi

(TABLE D HERE)

It will thus be seen that what the average salesman on the Omaha market actually sells is not 1000 cars of cattle and calves, 1500 cars of hogs or 1000 cars of sheep, but 488.52 cars of cattle or calves, 592.52 cars of hogs, and 573.44 cars of sheep. Moreover, if we are to imagine an ideal firm with one salesman for each species, each selling the "normals" established by the Secretary, we would have a sales record for that firm of 1000 cars of cattle and calves, 1500 cars of hogs and 1000 cars of sheep, or 3500 cars with an average over all species for the three salesmen of 1166.66 cars, instead of the 528.40 cars which reflects actual performance over all species. While the selection of the 27 "successful" firms used in the analysis for firms handling "2,000 or more" cars would raise all these averages somewhat, yet, they would still fall far short of the "normal" used by the Secretary. Only two firms have an average for cattle, only one an average for hogs and only two an average for sheep which compares with that adopted by the Secretary as a normal for rate fixing purposes. In other words, in arriving at such "normal" the Secretary has used, not normal, usual or ordinary performance, but unusual, extraordinary and maximum performance.

2. Advertising, Business Getting and Other Expense.

The Secretary found (R. 35)that expenditures in excess of 10% of gross commissions for advertising or other business getting are unreasonable and unlawful for rate-fixing purposes. Appellants contend that there is in the record nowhere any substantial evidence of unreasonable, excessive, illegal or wasteful expenditures for these purposes. No witness criticized any specific

expenditure made by any specific firm. Witness Tomlinson (R. 243) expressed the opinion that advertising has been carried too far but did not particularize further. Witness Shortell, (R. 348-53), the government's auditor, made no attempt to arrive at any normal or reasonable basis of expense for advertising, business getting, etc. The government's principal witness on the question of office management was witness Hopkins, (R. 291-4) and the effect of his testimony was that the expenses found on the books are necessary in order to maintain the service to shippers; that gradual changes in methods for the shippers' benefit create greater expenses, which can not be cut without cutting the service. The testimony of witness Stryker, (R. 732-7) shows a constant effort, extending over a period of 40 years, to reduce expense and eliminate the unnecessary. It also indicates an average business in 1925 of 2246.64 cars per firm per annum, as compared with 1941 per firm per annum in 1910.

Exhibit 104, (R. 79) shows total advertising of $220,707.09 and travel and entertainment $104,556.93, or a total of $325,264.02, or $2.54 per car business getting expense, as compared with the $2.00 for cattle, $1.50 for hogs and $2.25 for sheep allowed in the Secretary's order (R. 35). The Secretary's basis extended for the several species on the basis indicated in Exhibit 103 (R. 798) would produce a "normal" of all species of $1.85 per car. That is, the order allows 69 cents per car less than the actual expenditure, without competent proof of abnormal, unreasonable or excessive expenditures.

3. Going Concern Value.

The testimony of witness Tagg (R. 189-766), Tomlinson (R. 244), Hopkins (R. 290-5), Shortell (R. 321-3-6), Stryker (R. 741-51), and Laverty (R. 779-81, 784), which is undisputed, indicates that there is, inhering in an established live stock commission firm, a going concern value not found in a newly established business, and that this value is of such tangible character that it is frequently handed down from father to son.

4. Additional Depreciation.

Although depreciation was not set up in the Secretary's order as a separate item of basic cost, Exs. 7-C5, showed depreciation of $5,661.94, while Ex. 106, (R. 798) which is not disputed, shows that 33 firms out of 56 took no depreciation on their books, the total thereof not included in Exs. 7-65 or 104 being $6,164.92.

5. Additional Investment.

The government's auditor, witness Shortell, included in Exs. 7-65 only live stock exchange memberships actually appearing on the books. Those not on the books had a fair value in 1925 of $4,000.00 each, or a total of $312,000.00, as shown by Exhibit 107, (R. 798) not reflected in the government's audits or in the costs shown in appellants' Exhibit 103-4-5.

6. Bad Debts.

Neither the rate base (R. 35-6) nor the government's audits included any allowance for bad debts or other unpredictable losses, witness Shortell testifying (R. 313, 319) that he viewed the livestock business as a

cash business "and there is no need of a bad account." The undisputed testimony, however, shows that there are necessary incidental losses in handling the business, such as sales to customers who never pay for the stock, or losses on livestock repossessed, (R. 766).

It may be true that some of the items enumerated are relatively unimportant and almost negligible, inasmuch as an allowance for a return upon the going concern value, the additional depreciation and additional investment would make only a slight addition to the return which should be allowed these market agencies. But if the Court sustains the powers of the Secretary to fix rates, and thereby classes these market agencies with public utilities, it follows that erroneous methods of rate-making will vitiate and make illegal the results achieved; since the effect of the aggregate of all the items, large and small, is to deprive the petitioners of reasonable compensation for their personal services.

7. Supervision.

The testimony of witnesses Hopkins (R. 283-95), Tagg (R. 767) and Wood (R. 776) shows conclusively that supervision of both selling and office work is a separate phase of appellants' expense, whether taken care of by an owner-manager, employee-manager, or not set up on the books at all. Eleven firms have office managers. Salaries and per car cost, with a proportionate allocation to each species so as to produce a species average per car for the eleven firms, is as follows:

SUPERVISION—PER CAR

Firm No.	CARS HANDLED Cattle	Hogs	Sheep	Total	MANAGERS' SALARIES PAID Cattle	Hogs	Sheep	Total	PER CAR COST Cattle	Hogs	Sheep	All Species
4	2,489.08	1,658.66	58.64	4,206.38	$ 3,550.04	$ 2,364.49	$ 85.47	$ 6,000.00	$1.42	$1.42	$1.42	$1.42
8	3,538.86	1,299.75	412.74	5,251.35	3,032.52	1,113.74	353.74	4,500.00	.85	.85	.85	.85
13	4,141.91	1,183.00	1,222.26	6,547.17	3,321.28	951.67	977.05	5,250.00	.80	.80	.80	.80
18	3,061.39	1,134.54	2,204.79	6,400.72	1,674.01	620.38	1,205.61	3,500.00	.54	.54	.54	.54
23	937.18	797.30	682.37	2,416.85	1,398.43	1,185.21	1,021.65	3,605.29	1.49	1.49	1.49	1.49
25	712.34	1,811.57	10.48	2,534.39	1,349.13	3,531.03	19.84	4,800.00	1.89	1.89	1.89	1.89
28	3,215.80	1,820.78	421.69	5,458.27	8,682.20	4,974.36	1,143.40	14,799.96	2.70	2.70	2.70	2.70
31	1,784.34	1,071.59	63.14	2,919.07	1,941.82	1,286.81	71.37	3,300.00	1.13	1.13	1.13	1.13
34	1,701.90	1,720.89	63.62	3,486.41	2,050.24	2,073.12	76.64	4,200.00	1.20	1.20	1.20	1.20
43	2,463.85	2,333.75	275.52	5,073.12	5,245.20	4,968.26	586.54	10,800.00	2.12	2.12	2.12	2.12
48	2,787.78	1,281.19	1,063.06	5,132.03	3,911.12	1,797.46	1,491.42	7,200.00	1.40	1.40	1.40	1.40
TOTAL	26,834.43	16,113.02	6,478.31	49,425.76	$36,155.99	$24,866.53	$ 7,032.73	$67,955.25	$1.34	$1.54	$1.08	$1.38

And if we limit the comparison to the 4 branch firms, 18, 23, 31 and 34, on the theory that there only is the salary of a manager fixed by bargaining, so as to determine the market value of supervision, the per-car cost on the same basis is as follows:

SUPERVISION COST PER CAR—BRANCHES

Firm No.	CARS HANDLED Cattle	Hogs	Sheep	Total	MANAGERS' SALARIES PAID Cattle	Hogs	Sheep	Total	PER CAR COST Cattle	Hogs	Sheep	All Species
18	3,061.39	1,134.54	2,204.79	6,400.72	$ 1,674.01	$ 620.38	$ 1,205.61	$ 3,500.00	$0.54	$0.54	$0.54	$0.54
23	937.18	797.30	682.37	2,416.85	1,398.43	1,185.21	1,021.65	3,605.29	1.49	1.49	1.49	1.49
31	1,784.34	1,071.59	63.14	2,919.07	1,941.82	1,286.81	71.37	3,300.00	1.13	1.13	1.13	1.13
34	1,701.90	1,720.89	63.62	3,486.41	2,050.24	2,073.12	76.64	4,200.00	1.20	1.20	1.20	1.20
TOTAL	7,484.81	4,724.32	3,013.92	15,223.05	$ 7,064.50	$ 5,165.52	$ 2,375.27	$14,605.29	$0.94	$1.09	$0.78	$0.96

TABLE "E"

8. Other Cost Items Disregarded.

(a) The Secretary's rate base (R. 35-6) allows "for all other salaries," cattle $2.00, hogs $1.60 and sheep $1.80 per car. What items as shown on the books are accepted and what rejected is not stated, nor is there any discussion of the subject by the auditor Shortell or elsewhere in the record; and it is impossible to ascertain from the order or elsewhere how these figures are arrived at or how the allocation was made At any rate the mean for all species on the basis of 71,419.48 cars of cattle and calves, 45,643.50 cars of hogs and 10,749.01 cars of sheep, extended and divided by the total of 127,811.99 cars would be $1.82 per car, while actual expenditures, as shown by Exhibit 104 (R. 798) are $2.18 per car, or 36 cents of undisputed expense per car eliminated without affirmative evidence to justify taking a theoretical rather than an actual figure.

(b) The order allows for overhead, including the increased rental, at $1.75 for cattle, $1.50 for hogs and $1.75 for sheep per car or a mean of $1.66 per car. Actual expense as shown by Exs. 7-65 and 104, (other deductions and additional rent as shown in Ex. 104), produce a mean of $2.01 per car or 35 cents per car for all species eliminated without affirmative evidence to justify doing so.

These figures are the more striking when it is recalled that the computations in the Secretary's order are based on car load receipts of about 110,000 cars instead of the actual totals, after converting truck-ins and drive-ins, of 127,811.99 thereby increasing the spread between actual figures and the Secretary's hypothetical ones.

9. Elimination of Appellants.

Without detailed analysis of the testimony, it is plain from even a casual reading of the record that the intention of the order herein questioned was to lower rates to a point where a number of appellants would be required to quit business, on the theory that the remainder would so benefit from the resulting increase of business to them as to make the rate profitable to the survivors. That is, the theory of the regulating authority was and is that there are too many firms operating in Omaha and that his right in fixing rates is to eliminate many of them. This theory the trial court in effect sustained in its opinion, (R. 175).

The burden of the testimony of witnesses Graham, (R. 198), Jordan (R. 202), Tomlinson (R. 229-33-38-40) and Mollin (R. 260-1, 265-6), representatives of shippers' associations, testifying for the government, was that there are too many commission firms and that if half of them were eliminated, the "meritorious" firms would still retain their customers and do business profitably. "Unfortunately," said witness Tomlinson, "some of the fit ones may fail," (R. 240).

On the other hand, witnesses Stryker, (R. 751, 758-9), Tagg (R. 767), Tomlinson (R. 238-40), Wood (R. 776) and Laverty (R. 779), indicated that the practical effect of the Secretary's rate, if it becomes permanent, will be to eliminate many of the existing agencies. That this conclusion is correct is graphically illustrated by the appellants' audits, Ex. 103-4-5-11-22-23-23a, R. 798), particularly the last three, showing the actual income to the

individual members of the appellant firms, under the Secretary's rates, after paying their actual expenses for the year 1925. We respectfully call to the Court's attention these exhibits, which speak for themselves.

10. Relation of Other Live Stock Markets.

The record shows that conditions at all markets are substantially uniform (R. 228-40, 251, 757). South Dakota shippers, for example, patronize the Sioux City, Omaha and Chicago markets, (R. 252). The principal factor determining the price of, for example, hogs is the Chicago market (R. 304). Notwithstanding Chicago and Sioux City have rates higher than Tariff No. 2, under which appellants operated during the pendency of the proceedings below, there was in 1926 and 1927 a decided tendency of shippers to patronize those markets. (R. 776). Ex. 112-16 (R. 799) show the rates charged at Chicago, St. Louis, Kansas City, Sioux City and Denver. They show a general rate level, especially at Chicago and Sioux City, not only much higher than the Secretary's order, but also on a whole higher than the rates in Tariff No. 2, initiated by appellants and suspended by the Secretary when the proceedings leading up to the present rate order were begun before him.

11. The Probable Effect of a Full Commission on Traders and Speculators Sales.

The order here in question was so framed as to permit appellants to charge full commission of traders and speculators doing business in the stockyards as a possible source of recouping the reduction imposed upon shipments generally. The record shows without

dispute (753, 764, 768, 771, 777, 780, 786, 788), that even if adopted by appellants, the authorized increase would result in no actual increase of revenue because (1) appellants would not increase the rate to traders and speculators, (2) even if they did, the business of the traders and speculators would be crippled to the point where it would produce no more revenue at the full rate than it would at the half rate. (3) If trading survived under higher rates, it would come out of shippers, anyway, because traders would lose by as much as their rates were increased.

12. The General Situation Disclosed by the Record.

The record shows without dispute that the Secretary undertook commission rate reduction at Omaha in response to complaints concerning the general economic and financial situation of shippers (R. 196, 199, 201, 226, 252, 255, 267). But it also appears from the same evidence, and without dispute, that in that situation commission charges are a minor, even a negligible factor. The controlling factor at all terminal markets is the concentrated buying power of the packers. (R. 229, 242). The commission charge is the smallest of the distribution costs, which altogether take up only 3 cents of the live stock purchaser's dollar, of which the broker's commission is about nine-tenths of one percent of the shippers proceeds, (R. 798 Ex. 108), as against 4.3 to 5.6 cents for freight alone. (R. 740). The reduction imposed by the Secretary's rate order amounts to approximately one-tenth of one per cent of the value of the product (R. 740). It would take at least a fifty per cent increase in Tariff No. 2 to affect the growers'

costs or stop the flow of live stock to a given market (R. 774). Shippers' costs vary between startling and altogether unpredictable limits; for example, Exhibit 89, (R. 706), shows the cost of producing a calf to vary between $19.46 and $82.69. Exs. 93, 94 and 95, (R. 708-13) contain additional data to the same effect. The minor importance of commission charges, as a factor in the livestock producer's general economic situation, is borne out also by his failure to complain concerning them. The associations, whose representatives testified before the Secretary, comprise less than 2% of western shippers. Hog shippers, and shippers of all species in the agricultural districts, made no complaint through associations or otherwise. Testimony (R. 737-40), as to almost uniform satisfaction of appellants' patrons with the rates initiated by appellants themselves, is not disputed.

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SPECIFICATION OF ERRORS. (R. 833)

1. The Packers and Stockyards Act of August 15, 1921, (Chapter 64, 42 Stat. at Large 159), insofar as it purports to authorize the Secretary of Agriculture to fix the commissions charged by commission men for the handling and selling of live stock in the stockyards, is invalid for the following reasons:

(a) It is not a regulation of interstate commerce within the meaning of the commerce clause of the constitution.

(b) Even if it be a regulation of commerce, yet the said portion of the statute and the action taken thereunder by the Secretary of Agriculture, are subject to the prohibition of the Fifth Amendment and are, therefore, void as an impairment of the liberty of contract guaranteed by such amendment, and constitute a taking of property without due process of law.

(c) Insofar as the said Act of Congress attempts to delegate to an executive official the power to fix the labor wages of commission men, it is also void, as the Constitution has not authorized Congress to delegate such a power to regulate the wages of labor for a personal service.

2. The Court erred in finding that the Packers and Stock Yards Act of 1921, Title II (Chapter 64, 42 Statutes at Large 159; U. S. C. 1925, Title 7, Chapter 9), gives to the Secretary of Agriculture the power to issue an order to market agencies, such as plaintiff, at the conclusion of any hearing before him, the only authority for the issuance of an order of such character being found in Section 310 of said Act, which, in respect to market agencies, provides only that the Secretary may determine and prescribe just and reasonable rates, charges and

practices to be thereafter observed, but the authority to issue an order applying only to the owners and operators of stockyards and not to market agencies.

4. The Court erred in failing and refusing to find and hold that the rates and charges prescribed by the Secretary's order of November 19th, 1926, are unjust and illegal, in that they will not provide sufficient remuneration to repay petitioners their lawful expenses and a reasonable and just compensation for their services, and the enforcement of the order will have the effect of depriving petitioners of their property without due process of law, contrary to provisions of the Fifth Amendment to the Constitution of the United States.

5. The Court erred in failing and refusing to hold that the evidence presented to the Secretary of Agriculture was not sufficient to show or to establish that the tariff prescribed in the order of November 19th, 1926, would adequately compensate petitioners for their services and for the usual and legitimate disbursements made in rendering same.

6. The Court erred in holding that the presumption as to the reasonableness of the actual costs of a utility, in the absence of affirmative evidence of waste, extravagence and excessiveness, does not apply to the plaintiffs or to the business carried on by them.

7. The Court erred in finding and holding that the Secretary of Agriculture in issuing the order of November 19, 1926, had before him sufficient evidence upon which to construct a rate base, and in finding and holding that the Secretary in issuing said order included in the rate bases all items of expense to the plaintiffs.

8. The Court erred in holding that the Secretary could not find or ascertain from the actual operation of the business carried on by plaintiffs any common ground of reasonable maximum charges.

9. The Court erred in finding and holding that there is such variation in the several items of out-of-pocket costs of the various plaintiffs as to afford no uniform basis for fixing their actual costs as a part of a rate base.

10. The Court erred in sustaining the Secretary of Agriculture in disregarding actual costs in favor of "A normal of the actual cost of the particular item to those firms whose financial condition exhibits ordinary efficient management in their business".

11. The Court erred in sustaining the finding of the Secretary of Agriculture that the reasonable cost of handling a car of live stock in 1925 on the Omaha market was $13.25 for cattle, $9.85 for hogs and $13.05 for sheep.

12. The Court erred in finding and holding that the Secretary's finding as to the selling cost per car was based on evidence as to the actual experience in plaintiffs' business and that said finding was within his power and discretion.

13. The Court erred in holding that not one, nor an average, of the cost figures disclosed by the evidence as to the actual operation of plaintiff's business could be accepted as a reasonable standard for rate making purposes.

14. The Court erred in refusing to set aside the finding of the Secretary as to selling costs.

15. The Court erred in failing and refusing to find that the practical application to the plaintiffs' business of the Secretary's finding as to the reasonable cost of selling per car showed the Secretary's order unjust and unreasonable.

16. The Court erred in holding and finding that a comparison of actual averages of costs expended by plaintiffs in their business was immaterial; in failing to give any significance to actual averages so found; and in holding that such averages had no tendency to show that the finding of the Secretary, as to reasonable costs, was erroneous.

17. The Court erred in sustaining the Secretary's finding as to "reasonable costs" of other items of expense and in sustaining the Secretary's refusal to be bound by the facts as to the actual operation of the business, in arriving at reasonable costs.

18. The Court erred in holding that it was the plaintiff's duty at the hearing before the Secretary to apprise him of all overhead cost items that should be taken into account in fixing a rate base.

19. The Court erred in holding that going concern value should not be an element of the rate base in a business such as plaintiffs'.

20. The Court erred in finding and holding that the allowance of the reasonable cost of business getting, which included advertising, by the Secretary of Agriculture, was reasonable and within his powers.

21. The Court erred in holding that the Secretary's failure, in arriving at reasonable costs, to allow for bad debts, supervision, additional invested capital, going concern value and depreciation should have been called to the Secretary's attention by the plaintiffs; and in holding that the Secretary's failure to include these items was immaterial and had no bearing on the issue as to whether or not the Secretary's rates were confiscatory.

22. The Court erred in holding that the confiscatory character of the rates prescribed by the Secretary could not be demonstrated in advance of their practical operation.

23. The Court erred in holding that the rates prescribed by the Secretary included a sufficient margin to cover the basic costs omitted by him.

24. The Court erred in disregarding the undisputed evidence as to the effect of the increase, authorized in the Secretary's order, in the rate prescribed for traders and speculators.

25. The Court erred in holding immaterial the undisputed evidence as to the practical effect of the Secretary's rates on the individual plaintiffs, and the undisputed evidence as to the inability of individual plaintiffs to transact business, except at a loss, thereunder.

26. The Court erred in disregarding and in finding immaterial the evidence adduced before the Special Master as to the practical application of the Secretary's rates;

in eliminating from consideration the undisputed evidence as to the effect of practical application of the cost items found and allowed by the Secretary; and in finding such evidence immaterial on account of the inclusion therein of cost items condemned by the Secretay's order, without affirmative proof of the excessiveness of the several cost items so condemned by him.

27. The Court erred in finding and holding that a rate for personal services, admittedly confiscatory as to plaintiffs doing a small amount of business, and as to many plaintiffs irrespective of the amount of their business, can be sustained by fixing the number of plaintiffs entitled to carry on the business, or by eliminating numerous plaintiffs for the purpose of increasing compensation to those remaining.

28. The Court erred in finding that the plaintiffs' attack upon the order of the Secretary was not sustained by the evidence.

29. The Court erred in dissolving the temporary injunction and in denying to plaintiffs a permanent injunction.

30. The Court erred in dismissing the petition of the plaintiffs and the petition in intervention of the intervening plaintiffs.

31. The Court erred in failing and refusing to sustain plaintiffs' motion to confirm the report of the Special Master and enter decree in accordance therewith.

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SUMMARY OF ARGUMENT.

I.

The Packers and Stock Yards Act, insofar as it purports to authorize the Secretary of Agriculture to fix commissions charged by commission men for the handling and selling of livestock in the stockyards is invalid because:

(1) It is not a regulation of interstate commerce within the meaning of the commerce clause of the Constitution.

(2) Even if it be a regulation of commerce, yet the said portion of the statute and the action taken thereunder by the Secretary of Agricultrue are subject to the prohibition of the Fifth Amendment, and are, therefore, void as an impairment of the liberty of contract guaranteed by such amendment and constitute the taking of property without due process of law.

(3) Insofar as said act of Congress attempts to delegate to an executive official the power to fix the labor wages of commission men, it is also void as the Constitution has not authorized Congress to delegate such power to regulate wages of labor for personal services.

II.

The Packers and Stock Yards Act confers upon the Secretary no power to issue an order and compel the observance of the rates prescribed by him.

III.

The rate prescribed by the Secretary is unreasonable, non-compensatory and confiscatory and therefore, unconstitutional and void.

1. The rate must insure the utilities regulated a fair return based on the value rather than the cost of the service.

2. Erroneous and unconstitutional methods and deductions are used in arriving at items of basic cost.

3. Theoretical cost bases are adopted, in disregard of actual costs, without evidence to show that the latter are unreasonable.

4. The "normal cost" schedule omits basic cost items essential to the formation of a valid rate base.

5. The order seeks in part to justify general rate reduction by authorizing an increase, which, under the undisputed evidence, can not and will not be realized.

6. The order selects the Omaha market, notwithstanding materially higher rates elsewhere under substantially similar conditions, and in disregard of the undisputed possibility of general rate fixation.

7. The order is based upon the erroneous, unconstitutional and palpably unjust theory of a rate level, which will eliminate many of appellants, leaving the remainder to enjoy the speculative benefits resulting therefrom.

8. The order is based upon irrelevant considerations of the economic situation of appellants' patrons.

9. The rates and charges prescribed in the order are non-compensatory, confiscatory, unreasonable, unjust and unconstitutional when tested by the general situation disclosed by the record.

ARGUMENT.

I.

THE PACKERS AND STOCK YARDS ACT IS UNCONSTITUTIONAL.

This question will be argued in a separate brief.

II.

THE PACKERS AND STOCKYARDS ACT CONFERS UPON THE SECRETARY NO POWER TO ISSUE AN ORDER TO COMPEL THE OBSERVANCE OF THE RATES PRESCRIBED BY HIM.

The proceedings before the Secretary were initiated under Section 306 (e) of the Act, which provides that after a hearing under a proceeding so initiated, the Secretary "may make such an order with reference thereto as would be proper in a proceeding initiated after it had become effective." Section 309 provides for the making of complaints with the Secretary, and sub-division (c) of the same section authorizes the Secretary to institute an inquiry on his own motion on any matter on which a complaint is authorized. In all of these preliminary sections there is an apparent reference to power to be conferred upon the Secretary by later provisions of the Act, and to be exercised after the hearings have been completed.

Section 310 contains the authority of the Secretary to take the final action in all rate cases. It provides in effect that when any of such hearings have been completed and the Secretary is of opinion that any rate, etc. "is or will be unjust, unreasonable or discriminatory," the Secretary

> "(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable and nondiscriminatory to be thereafter followed; and

"(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed."

Other sections give the Secretary power to prevent discrimination between localities, to deal with reparation for past transactions, and to prevent fraudulent or deceptive methods; but the foregoing comprise all the Secretary's rate-making powers.

Section 314 is as follows:

"(a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense."

It is made the duty of the various district attorneys under the direction of the Attorney General to prosecute for the recovery of these forfeitures.

Section 310, in which alone the rate-making power is conferred, suggests that Congress had some definite purpose in separating the powers conferred therein into two sub-divisions. It seems clear that the power conferred by sub-Section "(a)" was a declaratory or finding power only, and if it stood alone and should be given

the construction which it obviously ought to bear in the context, recourse would be had elsewhere for machinery for putting the declared rates into effect, and compelling their observance.

In sub-division (b) the power is conferred to make an order for the observance of the rates found and declared in sub-division (a) and forbidding the making or publishing of any other rates, and requiring compliance with the rates so determined.

It might well be that if sub-division (a) stood alone it could fairly be argued that it was intended thereby to confer upon the Secretary power to make the findings effective by prescribing that they should be observed thereafter. But in that case there would have been no occasion for enacting sub-division (b). We must find a purpose in making this formal separation of the two sub-divisions, and the only reasonable inference to be drawn from the manner in which the powers in this section are phrased is that the first was intended to be the fact finding or declaratory power, like the verdict of a jury, and the second was intended to include the power to issue an order to compel the observance of the rates, as the court enters a judgment upon the verdict.

If these two sub-divisions applied alike to appellants the inquiry we are now pursuing would be immaterial. But sub-division (a), because of its reference to the preceding portion of the section, does clearly include a reference to market agencies, which include commission men. The Secretary is authorized to determine

and prescribe what will be the just and reasonable rate or charge to be thereafter observed, that is, by the market agencies as well as the stockyard owners referred to.

But sub-division (b) does not include market agencies, either expressly or by any reasonable implication. It authorizes an order to be made on "such owner or operator." As defined in Section 301 of the Act, "stockyard owner" means any person engaged in the business of conducting or operating a stockyard, and "stockyard" in Section 302 is defined as any place, et cetera, conducted or "operated" as a public market. Neither "owner" nor "operator" is anywhere used in the Act as applying to those market agencies who are engaged in making sales on commission.

The conclusion would seem clear that in Section 310, Congress intended to give power to the Secretary to find and declare for stockyard owners and market agencies alike, but that the enforcement order for the observance of those rates could be directed only to the owner or operator of a stockyard.

This does not make futile the declaratory power contained in sub-division (a), nor would it by any means terminate this litigation. The declaration of the reasonable rate to be charged by a market agency would still be effective for purposes of reparation and would furnish prima facie proof in support of all such claims. But it does not subject the market agencies to the penalties prescribed by Section 314. This section, being penal in its nature, must be strictly construed and no person

would be liable for the penalties unless coming within its precise terms; and as the penalties are affixed for the violation of "any order made under the provision of Section 310" and as Section 310 does not authorize the making of any order against market agencies, it is clear that those penalties are not enforcible.

For the purposes of the temporary injunction against the enforcement of the penalties found in Section 314, and also a final and perpetual decree of injunction, the failure of Congress to authorize in Section 310 the making of an order against the market agencies expressly referred to in Section 314 justifies the demand of appellants for injunctive relief, leaving the question of the consequence of a declared rate and its effect on this litigation to be determined and disposed of on other principles.

It is fundamental that if any power of regulation is in doubt it must be resolved against the regulating authority. *Milwaukee Electric Ry. & Light Co. v. Railroad Commission of Wisconsin*, 238 U. S. 174; *Home Telephone & Telegraph Co. v. City of Los Angeles*, 211 U. S. 265, 273; *Puget Sound Traction Light & Power Co. v. Reynolds*, 244 U. S. 574.

Nor can the application of Sec. 310 (b) be inferred, *redendo singula singulis*, as argued below, from the use of the words "owner or operator." The power to enforce rates must be conferred by language unmistakably to that end; it cannot arise by inference or implication.

The situation is therefore a complete analogy to that existing under the Interstate Commerce Act before

the enactment of the Hepburn amendments in 1906, power to prescribe reasonable rates did not imply authority to compel their observance, but that for the purpose where it was held that the grant to the Commission of of enforcing the rate found reasonable by the Commission, resort must be had to suits for reparation or other judicial action. *Maximum Rate Cases*, 162 U. S. 184, 167 U. S. 479, 168 U. S. 144. The changes brought about by the 1906 amendments are discussed in *I. C. C. v. Ry. Co.*, 202 U. S. 613, 50 L. Ed. 1171. Illinois also had a transportation act modeled upon the Interstate Commerce Act, and the Supreme Court of that state held to the same effect in *People v. Ry. Co.*, 270 Ill. 232, 110 N. E. 321. The omission of market agencies from Section 310 (b) in which the machinery for putting declared rates into effect is set up, therefore leaves the power of the Secretary, as far as market agencies are concerned, with exactly the same limitations as that of the Interstate Commerce Commission before the Hepburn amendments were passed.

III.

THE RATE PRESCRIBED BY THE SECRETARY IS UNREASONABLE, NON-COMPENSATORY AND CONFISCATORY AND, THEREFORE, UNCONSTITUTIONAL AND VOID.

1. The Rate Must Insure Appellants Fair Return, Based on Value rather than Cost of Service.

By Section 316 of the Packers and Stockyards Act, the Congress made applicable thereto the provisions of all laws relating to the suspending or restraining, or the enforcement, operation or execution of the orders of the Interstate Commerce Commission. The Federal court's power of review is no less and the respect due the order no greater, than in a proceeding to enjoin an order of the Commission. By familiar precedents, therefore, the order herein may be set aside on any one of the following grounds:

a. That the order violates the Federal Constitution.

b. That in making the order the Secretary relied upon some mistake of law.

c. That the order is beyond the Secretary's statutory powers.

d. That the order, though in form correct, is in substance unreasonable.

e. That the Secretary disregarded undisputed testimony and the legal effect thereof.

f. That a full hearing was not had before the order was entered.

The question whether a rate order is so non-compensatory, unreasonable and unjust as to confiscate the property of those subjected to it, thereby amounting to

a deprivation without due process as defined by the Fifth Amendment, is always a judicial question, of the power to determine which the courts can not be deprived by any presumption, statutory or otherwise, and which involves a review of the facts in order properly to apply the law.

> *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U. S. 287.
>
> *I. C. C. v. U. P. Ry. Co.*, 222 U. S. 541.

The rate here in question was fixed, not by the Legislature itself in the exercise of full legislative authority, but by an executive officer under delegated legislative power, pursuant to a legislative mandate contained in the very act making the delegation, which required the rate fixed to be reasonable, undiscriminatory, fair and just. The Secretary, therefore, must not only show a legal and constitutional warrant for imposing rates and bringing respondents within his regulatory power; he must not only proceed lawfully to the ascertainment of a reasonable rate; and he must not only accord to the appellants due process of law in arriving at the rate and in adopting the methods and classifications used as a basis for rate making; but he must, when all these steps have been taken, arrive at a rate which is fairly compensatory. To be fairly compensatory, of course, it must yield "fair return" to appellants; and fair return must be granted in an adequate and not a restricted sense. As this Court said in *Bluefield etc. v. Public Service Commission*, 262 U. S. 678:

> "The return should be reasonably sufficient to assure confidence in the financial soundness of the

utility, and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time, and become too high or too low by changes affecting opportunities for investment, the money market, and business conditions, generally."

To be confiscatory rates need not amount to a total deprivation of reward for services rendered. It is not every compensatory rate (if by compensatory is meant merely one yielding some revenue) that is non-confiscatory. Not every compensatory rate in this sense is just and reasonable; there is not even a presumption that it is. Not every non-confiscatory rate is just and reasonable enough to be compensatory in the legal and constitutional sense. The patron of a utility must pay what the service is worth to him as a patron and as a member of the general public, even though the utility might conceivably exist on a lower rate. The business is entitled to compensation for every element of reasonable expense connected with the service (the judge of what is reasonable expense being not the regulating body but the business itself) as well as the expense legitimately connected with the purposes for which it exists. Its right to exist in the status in which the regulatory body finds it when regulation begins is supported by every presumption of substantive and constitutional law; nor can any consideration, other than the intrinsic justice and reasonableness of the rate itself, be invoked to overcome these presumptions.

Banton v. Belt Line Ry. Corp., 268 U. S. 413;

Bellamy v. R. Co., 215 Fed. 18;

Monroe Gaslight & Fuel Co. v. Comm'n., 292 Fed. 139.

No presumption in favor of the findings of fact of a rate making body can preclude judicial inquiry, whether such findings are supported by evidence, in excess of the power conferred, in disregard of constitutional limitations, or otherwise amount to an abuse of power.

Manufacturers Ry. Co. v. U. S., 246 U. S. 457;
Skinner v. U. S. A., 249 U. S. 557;
Central R. Co. v. U. S. A., 257 U. S. 247.

Nor can any such presumptions be invoked to sustain findings unsupported by evidence, or made in disregard of undisputed facts.

Florida & C. Ry. Co. v. U. S., 234 U. S. 167;
Louisville etc. R. Co. v. U. S., 238 U. S. 1;
Akron & C. R. Co. v. U. S., 261 U. S. 184.

Of course, the respect accorded the findings of fact of a rate making body applies only to facts actually found, and can not prevent judicial inquiry into the contention that essential findings were not made.

State of Colorado v. U. S. A., 271 U. S. 153;

These findings constitute only a rebuttable presumption, which may be overcome by evidence submitted by the business affected, or taken from the entire record.

Meeker v. R. Co., 236 U. S. 412.

Entirely independent of any presumption, the Court has power to inquire as to the method whereby the rate making body reached its conclusions.

U. S. A. v. R. Co., 242 U. S. 208;

C. M. & St. P. R. Co. v. P. U. Comm., 274 U. S. 344.

Fundamentally, whether a rate is reasonable or confiscatory, is a mixed question of law and fact, and the Court must pass on the facts in order correctly to apply the law.

First National Bank v. Hartford, 273 U. S. 548;

Truax v. Carrigan, 257 U. S. 312;

K. C. So. R. Co. v. Albers, 223 U. S. 573;

Jones Nat'l Bank v. Yates, 240 U. S. 541;

No. P. R. Co. v. North Dakota, 236 U. S. 585.

Nor is the Court, in passing on the validity of a rate order, confined to the grounds given by the rate making body.

I. C. C. v. Ill. C. R. Co., 215 U. S. 452;

So. P. R. Co. v. I. C. C., 200 U. S. 536;

Louisville & C. R. Co. v. I. C. C., 184 Fed. 118.

In this case the Secretary based his entire finding upon a single factor, stated in paragraph 8 of his order (R. 28-9)—cost of service plus a reasonable profit. We submit that the record shows without dispute that he erred in all his findings as to all the principal elements of the service appellants render their patrons. That

aside, and without attempting a detailed study of rate making, we respectfully submit that a rate based entirely on cost of service, in a business such that the regulating authority concedes his inability to contrast income with actual cost without a distortion which renders the contrast valueless, sets up, at the beginning and as the very basis of the rate, a misleading and fallacious foundation, having no relation to the actual facts connected with the business; that cost of service, so ascertained, with "reasonable profit" added, adds the rate making authority's speculation to an inherently fallacious rate basis; and even when its fallacies are safeguarded, leads to error and confusion in constructing the rate, and consequently to a rate constructed on theory rather than facts.

Rate making authorities, and the Federal courts in reviewing their findings, have repeatedly held that costs can not ordinarily be reached accurately enough with reference to any particular portion of the traffic, or to traffic as a whole, to justify rate making on a cost basis alone.

Interstate Commerce Commission v. Chicago, Great Western Ry. Co., 141 Fed. 1003; affirmed *I. C. C. v. G. W. Ry. Co.*, 209 U. S. 108)

Wood v. Vandalia R. Co., 231 U. S. 1;

Banton v. Belt Line Ry. Corp., 268 U. S. 413;

No. P. R. Co. v. North Dakota, 236 U. S. 585;

Adriatic Mining Co. v. C. & N. W. Ry. Co., 78 I. C. C. 611.

Moreover, the cost of service is not to be taken into consideration at all, unless it can be accurately ascer-

tained, and all costs can be included and apportioned in such a way to make each portion of the traffic bear its fair load. Some of the difficulties connected with such ascertainment in a situation as complicated as that herein, are dealt with in *No. P. R. Co. v. North Dakota,* 236 U. S. 585, where this Court, in concluding, commented on the record before it in language extremely pertinent in this case:

> "It should be said, further, that we find nothing in the record before us, and nothing in the facts which have been set forth with the most careful elaboration by the state court, that can be taken to indicate the existence of any standard whatever by reference to which the rate in question may be considered to be reasonable."

The test of the reasonableness of a rate is the value, rather than the cost, of the service for which the rate is charged; and the Secretary made no effort whatever to determine or to find the value of the services rendered by appellants. Conceding that actual cost of service, if fairly ascertained, might be regarded as a minimum below which rates should not go, there was no effort to determine the maximum beyond which they should not be allowed to go, whether defined as "what the traffic will bear," "the level at which the flow of patronage will stop," or otherwise; much less to find any mean between such minimum and maximum, which would represent the intrinsic value of the service to the patron.

The foregoing by no means covers all of the flaws in the defendants' application of the cost of service theory, even if that theory were inherently sound. For

example, it cannot be denied that the live stock commission business is carried on under conditions of joint cost, as far as the various items handled are concerned; the only cost which the Secretary made any effort to determine as a direct cost being that of selling; and even in that case the evidence shows without dispute that the listing of a salesman as a cattle or hog salesman means nothing, and that he may not only sell all the dozen different kinds of shipments within the particular species, but may also be expected to act on occasion as yard man, office man or in some other capacity. And throughout Auditor Shortell's testimony, and expressly in the order, it is stated that other costs cannot be allocated except upon a purely arbitrary basis. Yet nowhere does the Secretary attempt a separation as between direct and joint costs. Neither is there any attempt to ascertain constant and variable costs as these terms are generally understood in rate-making; or "actual" as opposed to "additional" cost as a basis for a conclusion as to how much more business petitioners could handle without increasing total costs. Nor is there anywhere any valid attempt to determine the "unused capacity" of the business either as to individual petitioners or as a whole, the only effort in this direction being the fantastic speculation of one witness that a salesman ought to sell 2,000 to 2,500 cars of livestock a year if he had them to sell, later used by the Secretary as a basis for the construction of that figment of the imagination, the "salesman of ordinary ability" upon whose hypothetical efforts selling costs are attempted to be determined.

2. Erroneous and Unconstitutional Methods and Deductions Are Used by the Secretary in Arriving at Items of Basic Cost.

Although the Secretary's rates are claimed to be based on cost of service, plus a reasonable profit, and a detailed cost account it attempted to be set up in paragraph 20 or the order, (R. 35-6) detailed findings are made with respect to but two items: (1) selling and (2) advertising and business-getting. As already noted, the Secretary's aim was to arrive, not at the actual cost of salesmanship, but at the "reasonable expense" to be allowed therefor.

By settled principles, actual costs must be accepted as part of the rate base, insofar as the cost of service is a legitimate part of that base, unless there is affirmative evidence in the record indicating that actual costs are unreasonable or that the managers of the business regulated have abused their discretion in incurring and paying the actual costs. This principle applies to the Secretary's disregard of the actual cost of salesmanship in favor of a purely hypothetical "reasonable expense" just as forcibly as it does to actual cost of business getting. At this point we wish only to point out that the "reasonable expense" is arrived at through purely speculative, hypothetical and fantastic means, having no basis of real fact whatever in the record, and that it is based upon a classification of the petitioners as among themselves, which is in itself erroneous and unconstitutional.

As a preliminary to ascertaining the "reasonable expense" of salesmanship, the Secretary considers in para-

graphs 14-18 of the order (R. 32-4) the various items of expense and undertakes to revise the figures shown by the commission men's books, not to determine what the business has actually cost them, but what in his judgment it ought to have cost them . As to the average salary of the typical salesmen, there is presumably not a great deal of controversy; there are salesmen receiving less salaries than the $5,000 for cattle, $4,000 for hogs and $5,000 for sheep adapted as a "normal," and many receiving much more; and the record perhaps justifies the conclusion that these are fair salaries for salesmen of ordinary and average ability connected with firms who do an average or better than average amount of business.

But as to the amount of business which each salesman is supposed to do to earn his salary, the Secretary makes the supposition, based on the speculation of a single witness, that a salesman can sell a certain number of cars in a year. That witness was never in the commission business himself; and his supposition was in disregard of the testimony of men actually engaged in the business, whose competency and fairness will not be questioned, that it was impossible to estimate the number of cars per year that a good salesman ought to sell, that number depending entirely on his opportunities, which in turn were impossible to foresee, even from day to day, to say nothing of from year to year. The testimony, heretofore summarized and tabulated, (*ante,* p. 26) shows without dispute that the average cattle salesman sells 488.82 cars, the average hog salesman 592.52 cars, and the average sheep salesman 573.44, as compared with the hypothetical 1,000,

1,500 and 1,000. We are quite willing to submit to any fair revision of these figures, so as, for example, to eliminate the smaller firms whose salesmen presumably do not have a full opportunity to exercise their talents; but no matter what prestidigitation of the actual figures may be attempted, the record will still be found utterly lacking in evidence of the existence of the model salesman upon whom the Secretary stakes his analysis of selling costs.

The isolated instances (*ante*, p. 26) where average car per year figures approach those adopted by the Secretary as "normal," far from aiding the Secretary's conclusions, more clearly show their complete unfairness. For, certainly, "normal selling costs" if not based upon mathematical averages in the ordinary sense, must at least be based upon what is normal in the sense of usual, customary and to be expected of the salesman under the opportunity which he may actually expect to have, and not upon what never existed outside of witness Mollin's imagination. And while, of course, the shipper should not be compelled to pay a rate based on the selling performance of the salesman who never has an opportunity to sell, appellants, if they must submit to regulation of their rates, cannot constitutionally be compelled to submit to a rate based upon a maximum opportunity which never existed, unless the regulating authority is also prepared to bring that opportunity to pass, by compelling Mollin and every other shipper to send his live stock to the Omaha market, and when it gets there, to put it in the hands of the regulated agencies. If there were no way of ascertaining selling capacity except by a speculative opinion such as Mr. Mollin's,

an inquiry as to what the model salesman could do in a year might be relevant; but as the figures already tabulated conclusively show, the actual facts, from which can be deduced a fair estimate of what the normal salesman of average ability with fair opportunity can do, are available.

It will, of course, be argued that the testimony of Reed (R. 791) offered in evidence by the Government, shows that in the case of John Clay & Co., the salesmanship cost of each car would be only $2.00 because they expect a $6,000 a year salesman to sell 3,000 cars. A comparison of certain figures in the audit of this firm, however, produces a striking result. Exhibit 103 (R. 798) shows that they handled 6,400.73 cars in 1925. They paid $23,700 for employee salesmen and $8,900 for employee buyers (being a branch they have no owner salesmen), (R. 798) or $32,600 buying and selling costs, a fraction more than $5.00 per car over all species. Their gross commissions for 1925 under the Secretary's order would have been $102,326.25 (R. 830); excluding the increase in seconds, $101,516.38 (R. 798). Their total cost of conducting the business, adopting the Secretary's salary schedule (Ex. 105, R. 798) was $108,180.59, leaving a loss on the one base of $5,854.74, and on the other of $6,664.21. Their actual expenses and deductions were $103,781.37 (R. 487); additional rent of $3,979.80 brings actual expenses to $107,761.17; leaving a deficit of $5,434.92 on the one basis and $6,244.79 on the other, without taking into account interest on investment, depreciation, or other omitted items. This firm employs all its salesmen and buyers and presumably gets the best results by bargaining with them, yet it will be obliged

to quit the market (R. 792) if the Secretary's order remains in force, according to the testimony introduced by defendants, which is presumably as binding upon them as Mr. Reed's speculation as to what a $6,000 a year salesman ought to sell is upon petitioners.

All of the above, of course, takes no account of the basic objection to this sort of cost inquiry—that it proceeds on the supposition that petitioners are merchandising their employees' services and obtaining a profit therefrom, ignoring the fact that this so-called "profit" is not a profit at all, but petitioners' primary reward for the personal services they render.

In addition to the inherent vice in this method of getting at costs, the classification of petitioners as between themselves, adopted for the purpose of arriving at it, is fallacious and unconstitutional.

From paragraphs 12-13 of the findings and order (R. 30-2 the process adopted by the Secretary's representatives in getting at some sort of cost figure for rate-making purposes is apparent. This process consisted, not in determining the cost of operation to each individual respondent, and not in taking such individual costs and averaging them for the purpose of getting at an average cost, and not of eliminating abnormals until a normal actual cost was arrived at through averages or otherwise, but in dividing all appellants into five arbitrary classes, based entirely upon the number of car loads of live stock handled by them yearly, striking an average for each of the groups thus obtained and then,

apparently, of combining these group averages for the purpose of getting an average for the industries as a whole, or at least of indicating the maximum and minimum cost values which should be taken into account. What we are concerned with now is the validity for rate-making purposes, of such a classification, based entirely on the quantity of business done, as well as the validity of group averages obtained by treating a particular industry as a member of such group and weighing it with the average for that group rather than determining its unit cost as an individual matter.

The words "due process of law" have the same meaning in the Fifth and Fourteenth Amendments. *Hurtado v. California*, 110 U. S. 516.

One of the conspicuous cases arising under the latter amendment is *Cotting v. Godard*, 183 U. S. 79, where a Kansas statute limited charges of stockyard companies, the act applying only to yards having average daily receipts of not less than 100 head of cattle, 200 head of hogs, or 300 head of sheep. The act made no distinction as to the character of services rendered. It was general in its terms and applied to any corporation doing business of a certain amount. In the particular case before the Court it appeared that by virtue of the great amount of business done by the complainant it could make a reasonable income. It was none the less held that the statute made a positive and direct discrimination between persons engaged in the same class of business, and based it simply upon the quantity of business which each might do. In that connection the Court said:

"Pursuing this thought, we add that the state's reguation of his charge is not to be measured by the aggregate of his profits, determined by the volume of business, but by the question whether any particular charge to an individual dealing with him is, considering the service rendered, an unreasonable exaction. In other words, if he has a thousand transactions a day, and his charges in each are but a reasonable compensation for the benefit received by the party dealing with him, such charges do not become unreasonable because by reason of the multitude the aggregate of his profits is large. The question is not how much he makes out of his volume of business, but whether in each particular transaction the charge is an unreasonable exaction for the services rendered. He has a right to do business. He has a right to charge for each separate service that which is reasonable compensation therefor, and the legislature may not deny him such reasonable compensation, and may not interfere simply because out of the multitude of his transactions the amount of his profits is large. Such was the rule of the common-law, even in respect to those engaged in a quasi-public service, independent of legislative action. In any action to recover for an excessive charge, prior to all legislative action, who ever knew of an inquiry as to the amount of the total profits of the party making the charge? Was not the inquiry always limited to the particular charge, and whether that charge was an unreasonable exaction for the services rendered?"

The Court then quoted from *Parkersburg & O. River Transp. Co. v. Parkersburg*, 107 U. S. 691, 699, and *Canada Southern R. Co. v. International Bridge Co.*, L. R. 8 App. Cas. 723, 731, and continued:

"* * * The queston is always, not, What does he make as the aggregate of his profits? but, What is the value of the services which he renders to the one seeking and receiving such services? Of

course, it may sometimes be, as suggested in the opinion of Lord Chancellor Selborne, that the amount of the aggregate profits may be a factor in considering the question of the reasonableness of the charges, but it is only one factor, and is not that which finally determines the question of reasonableness. Now, the controversy in the circuit court proceeded upon the theory that the aggregate of profits was the pivotal fact. To that the testimony was adduced, upon it the findings of the master were made, and in recognition of that fact the opinion of the court was announced. Obviously, as we think, in all this the lines of inquiry were too narrowly pursued."

Other decisions condemning such classification are:

N. P. Railway Co. v. Department of Public Works, 268 U. S. 39.

U. S. v. Abilene & S. R. Co., 265 U. S. 274.

Interstate Commerce Commission v. Stickney, 215 U. S. 98.

3. The Secretary's Order, and Especially Its Cost Schedule, Insofar as it Disallows Expense Actually Incurred by Appellants, is Unauthorized, Illegal and Void.

The Secretary entered into some discussion, in paragraph 19 of the order, (R. 34) of the cost of advertising and business getting. Perhaps, also, this discussion is in some degree a reflection of the Secretary's belief as expressed in paragraph 22, (R. 37) that petitioners' "monopolistic powers" of fixing charges without the usually attendant economy of expenditure for business getting, "results in fierce competition for business." How the Secretary arrived at this conclusion or where he obtained the information upon which he based it is

difficult to judge; certainly there is not a word of evidence in the record justifying it. On the contrary, witness after witness testified that his particular firm, and firms generally, were running their businesses as efficiently and economically as possible, incurring and paying only expenses necessarily incident to the business; and the whole history of the Live Stock Exchange is a record of efforts to minimize operating costs and eliminate all items not strictly necessary to the efficient conduct of the business. The sole basis of the conclusion that business getting costs are too high is the statements, already digested herein, of some of the grower association representatives, that they thought commission firms were spending too much for some forms of advertising, particularly market papers. Yet witness after witness also testified to innumerable reasons why one firm might be obliged to spend more than another, or why an individual firm might be obliged to spend more during one year than another. All of the reasons stated in the record were legitimate reasons and no effort whatever was made by the Secretary to distinguish, or to show what was the situation and practice of individual firms, much less to bring into the record affirmative evidence that unreasonable or extravagant expenses had been incurred. If the Secretary intended to disregard these expnses as shown by the books it was his duty to have shown affirmatively just what expenses were unreasonable, the universal rule in ratemaking being that in the absence of affirmative evidence of abuse of discretion by the management of a business in the incurring of operating expenses, it is presumed that such expenses are legitimate as incurred and

as shown by the utility's records; and unless the regulating authority affirmatively overcomes such presumption, the same are allowable as part of the rate base. Nor may a regulating authority reduce rates on the assumption that changes in business practices will produce economies, unless it also imposes those changes uniformly upon all industries affected.

In the conspicuous case of *Missouri ex rel Southwestern Bell Tel. Co. v. Public Service Commission*, 262 U. S. 276, this Court said:

> "There is nothing to indicate bad faith. So far as appears, plaintiff in error's board of directors has exercised a proper discretion about this matter requiring business judgment. It must never be forgotten that while the state may regulate, with a view to enforcing reasonable rates and charges, it is not the owner of the property of public utility companies, and is not clothed with the general power of management incident to ownership. The applicable general rule is well expressed in *State Public Utilities Commission ex rel Springfield v Springfield Gas & E. Co.*, 291 Ill. 209, 234 P. U. R. 1920C, 640, 125 N. E. 891:
>
> 'The commission is not the financial manager of the corporation, and it is not empowered to substitute its judgment for that of the directors of the corporation; nor can it ignore items charged by the utility as operating expenses unless there is an abuse of discretion in that regard by the corporate officers.'
>
> "See *Interstate Commerce Commission v. Chicago G. W. R. Co.*, 209 U. S. 108, 52 L. Ed. 705, 28 Sup. Ct. Rep. 493; *Chicago M. & St. P. R. Co. v. Wisconsin*, 238 U. S. 491, 59 L. Ed. 1423, L. R. A. 1916A, 1133, P. U. R. 1915D, 706, 35 Sup. Ct. Rep. 869; *People ex rel Delaware & H. Co. v. Stevens*, 197 N. Y. 1, 90 N. E. 60."

In *Bronx Gas & Elec. Co. v. Public Service Com. et al*, P. U. R. 1923A, 255, the New York Public Service Commission approved the report of a referee who rejected various hypothetical and theoretical estimates presented by experts testifying for the Commission, in the following expressive language:

> "As to the operating expenses, including distribution and other general expenses, I shall take the actual figures from the evidence based upon the plaintiff's books, as I am convinced that they correctly record not only what was actually expended, but what it was reasonable and necessary to expend for manufacturing and distributing the company's product. I therefore, reject the hypothetical and theoretical estimates presented by the defendant's witness, *and would do so even if he had been shown in this case to be qualified by actual experience to theorize upon so practical an art as making and distributing gas.*"

Among the almost innummerable late cases to the same effect are:

Chicago Rys. Co. et al v. Illinois Commerce Commission, 277 Fed. 970;

New York & Richmond Gas Co. v. Prendergast, 10 Fed. (2d) 167;

State Public Utilities Commission v. Springfield Gas & Electric Co., 291 Ill. 209, 125 N. E. 891;

Consolidated Gas Co. v. Newton, 267 Fed. 231, (affirmed 258 U. S. 165);

Columbus Gaslight Co. v. Public Service Commission, 140 N. E. 538;

Re Southern California Telephone Co., P. U. R. 1922C, 97.

The appellees, of course, contend and the trial court held, (R. 171-6), that the effect of the Secretary's setting up of "reasonable expense" at "normals" much less than those obtaining in practice, was not to prescribe what any appellant's expenses should be, much less to interfere with the management of the business of any appellant, but merely to fix a factor for rate making purposes, which could not be disturbed by the court in advance of its actual application. Such an argument was disposed of in *Chicago Rys. Co. v. Illinois Commerce Commission, supra,* as follows:

> "If the Illinois Commerce Commission had the right, under the act of its creation, to order changes in operation of utilities, in this case it is aiming to accomplish its end by drastic and unlawful means. It is one thing to order (1) changes in routing of cars; (2) reduction in lay-over time to employees; (3) remodeling of accident and law department; (4) reduction of wages and labor; (5) deferring maintenance and renewals; (6) in fact, to order any variation of operation making for the public good. It is quite another thing, having in mind all of these benefits to the utilities and to the public, to say to the utilities we admit that it costs you over 6 cents to carry every passenger; we will, however, reduce your fare rate to 5 cents, and invite you to test out our opinion as to what improvements may be made in the internal operation of your own business.
>
> "The basis of the commission's action in this case is quite wrong. As outlined by its chairman, and urged by its counsel, supplemented by the corporation counsel for the City of Chicago, it affords no *locus poenitentiae* for the plaintiff railroads. No opportunity is given them to try out the urged reforms. They are told in advance that the medicine is good and that they must take it, whether they like it or not, irrespective of whether it has any thera-

peutic value. The orderly, rational, and legal method of procedure would have been for the commission to outline these various changes in management and operation, and invite the companies to put their suggestions in force, giving the companies an opportunity to demonstrate the benefits, or even the possibilities, of the order.

"All of the changes suggested by the commission were matters of conjecture and opinion, and it is quite within the range of human thought that some of the changes could not be carried out to advantage, either to the companies or to the people. Why, then, should the Illinois Commerce Commission, discounting impossibility of performance, direct a rate which both it and the City of Chicago admit will not produce operating expenses, to prevail until their views are adopted. Too much commendation cannot be given to any public utilities commission for its interest in public affairs. It will always be forgiven if its enthusiasm leads it to incidental legal excesses. It cannot, however, act arbitrarily to force its views without trial."

The foregoing observations apply to at least three items, set up by the Secretary, arbitrarily, illegally and without basis of fact, at weights less than actual expenditures, and for which the actual cost, as disclosed by the undisputed evidence, must under the foregoing rules be substituted:

(a) *Advertising and Business Getting,* 69c per car omitted (***ante,*** **pp. 28-29).**

(b) *Other Salaries,* 36c per car omitted (ante, **p. 34).**

(c) *Overhead,* 35c per car omitted (***ante,*** **p. 34).**

4. The "Normal Cost" Schedule Omits Basic Cost Items Essential to the Formation of a Valid Rate Base.

We are here concerned with the construction of an accurate cost schedule. Whatever use is made of it after its construction, it is invalid either as a basis of rates or as a means of establishing a minimum below which rates shall not go, unless it includes every item necessarily incident to the business regulated. It must include all items of constant cost. It must include all ascertainable items of variable cost. It must either include a fair estimate of such additional costs as will be imposed by the additional business which a fair rate is supposed to create, or be graduated so as to make the rate capable of being adjusted to that additional business and additional cost when it comes. And it is utterly invalid if it fails to take into account all the reasonable and constant expenditures which the utility must incur.

Nor is this argument met or avoided by saying that only such items as appear in the books will be allowed. The auditor Shortell was careful to make clear that many of petitioners' books were nothing to boast of from an accounting point of view (R. 355) and that he did not hesitate to disregard them where not in accord with his own theories of accounting (R. 326, 338) or to set up such accounting schedules as he deemed necessary whether appellants' books included them or not. And certainly appellees cannot disregard actual costs as applied to salesmanship, business getting, overhead and other salaries, and at the same time insist that the books must govern the omission or addition of items of basic cost ordinarily recognized as part of a rate base.

(a) Depreciation.

While this is a personal service business requiring comparatively little capital, yet some capital is necessary, the Secretary himself having set up the return thereon as part of his cost schedule. The depreciation actually taken was $5,661.94. The additional depreciation not shown in the Government's audits, Exhibits 7-65 or in Exhibit 104, and computed on a basis which is not disputed, was $6,164.92, (Ex. 106, R. 798) or a total of $11,826.86. This is, roughly $.10 per car, which is of course a factor of constant cost. The point here is not only that the additional depreciation was not included, but that depreciation as such was not set up, as it is in every reasonable rate structure, as a separate item of basic cost. That it must be so included in order to make the rate valid is a fundamental proposition in rate-making, and supported by the universal weight of authority.

Knoxville v. Knoxville Water Co., 212 U. S. 1.

Montana W. & S. R. Co. v. Morley, 198 Fed. 991, 1004.

Cumberland Teleph. & Teleg. Co. v. Louisville, 187 Fed. 637, 654.

Metropolitan Trust Co. v. Houston Co., 90 Fed. 683.

Houston Electric Co. v. City of Houston, 265 Fed. 360.

(b) Going Concern Value.

The evidence established beyond dispute the fact that the live stock commission business is one which depends upon experienced, proven skill and established connections, many of the latter of such tangible nature

that they are handed down from father to son. The fact that appellants' stock in trade is principally experience, skill and following, in short their own personalities, but strengthens the inference that even more than the ordinary publicly regulated business they are entitled to fair return upon not only the actual investment but also the value created in the course of the establishment of the business—that is, on that additional value which inheres in a business established and operating as compared with one with the same capital and personnel starting in business for the first time. This element was totally disregarded, not only throughout the inquiry before the examiner, but also in the findings and order. The utmost consideration appellants received was that good will was allowed as part of net worth where it had been set up on the books as the result of an actual transaction, such as a payment on sale of a business, etc.; the general rule followed, however, being to disallow it. But whether shown on the books or not, that element was a part of appellants' investment in the business in every case of a concern established and operating, and it was the duty of the Secretary to ascertain its value and allow a fair return upon it, as part of his cost account. The fact that in the case of a personal service business this going concern value would be extremely difficult of ascertainment could not relieve him of this duty. The item of value was there; the cost schedule was and is fatally defective without it; and no more in connection with this phase of the case than any other is the regulating authority held down to mathematically exact allowances, so long as the allowances actually made are reasonably fair under

the circumstances. And petitioners cannot constitutionally be required to submit to regulation at all, unless fair return upon all such items is assured them, however difficult of ascertainment such return may be.

The authorities are likewise unanimous in support of the proposition that petitioners were entitled to this allowance and that the rates ordered by the Secretary are fatally defective without it.

McArdle v. Indianapolis Water Co., 272 U. S. 400.

Des Moines Gas Co. v. Des Moines, 238 U. S. 153.

Denver v. Denver Union Water Co., 246 U. S. 178, 191, 192.

Omaha v. Omaha Water Co., 218 U. S. 180, 202, 203.

Cleveland, C. C. & St. L. Ry. Co. v. Backus, 154 U. S. 439.

Bluefield Water Works v. Public Service Commission, 262 U. S. 679.

Southwestern Bell Telephone Co. v. City of Ft. Smith, 294 Fed. 102, (affirmed 270 U. S. 627).

Pacific Telephone Co. v. Whitcomb, 12 Fed. (2d) 279.

It will be seen from the foregoing cases that how much ought to be allowed for going concern value depends entirely on the circumstances, the character of the business, etc. It might have been ascertained with fair accuracy by detailed inquiry on the part of the Secretary as to just how long each business had been established, the experience, skill and established connec-

tion of each member of each petitioner firm, and the amount which the established business in the hands of each established firm represented as compared with a firm beginning operations. This was not done, and the Secretary only is responsible for its omission. There are, however, in Exhibits 7-65, some figures on good will that may be of some assistance. We do not, of course, mean that good will as such is allowable as part of the rate base, much less that it is synonymous with going concern value. Yet these figures, as witness Shortell testified, represent amounts actually paid for the established businesses of the concerns in the course of sales and other transactions and may therefore shed some light, however dim, upon the question. The audits of only seven firms include any good will, allowed by Shortell as part of the net worth which makes up the total for the market of $771,571.00 invested capital allowed. The numbers of those firms, the amount of good will and the net worth are as follows:

Firm Number	Good Will	Net Worth
2	$ 7,200.00	$ 2,936.93
9	1,971.40	38,234.87
16	2,500.00	4,500.00
21	1,000.00	8,008.30
45	4,272.57	5,259.92
47	15,000.00	20,853.88
49	500.00	16,929.42
	$36,943.97	$96,223.32

Of these seven firms, the net worth after deducting the good will is $59,279.35. The good will, therefore, is .623 of the remaining capital. If we deduct from the

total capital of $771,571.00, the $96,223.32 representing the total net worth of these seven firms, we have left $675,347.68, being the "remaining capital," including no good will, of the other firms. On the proportions indicated by the average for these seven firms, there would be additional good will of $420,741.60 for the other firms. Just how representative the seven firms are in the relationship of good will to net worth other than good will, we are, of course, not prepared to say, nor is it appellants' duty to do so. But these figures were certainly sufficient to have furnished the Secretary with a point of departure for the inquiry as to going concern value of which it was his unqualified legal duty to make.

(c) Bad Debts.

In spite of the undisputed testimony that certain losses on account of bad debts are inevitable no matter how carefully a commission business is handled, (*ante*, p. 30), the order makes no basic allowance therefor, on the basis solely that the commission business being a cash business, no credits are necessary and therefore no bad accounts are allowable. That this was not only in disregard of the undisputed testimony, but also wholly arbitrary and unjust, we think requires no elucidation. And where it is shown, as it was in this case, that these are necessary and constant losses, it is the duty of the regulating authority to ascertain them, determine what a fair allowance for them is and set it up as part of the rate base. We do not presume to say on what basis it should be done in this case; but certainly deductions taken by each firm on account of bad accounts and other necessary deductions over a sufficient

period of years to be sure of representative figures were readily available; the regulating authority was charged with an affirmative duty to ascertain what the normal cost on this account is; and no more in this particular than any other are the appellants obliged to submit to regulation unless all items of normal cost are not only allowed but set up as normals in the cost schedule, where the cost of service theory is used in constructing the rate. There are, of course, various ways of getting at the normal allowance for bad accounts and other similar deductions. For example, in *Re Northern States Power Co.* P. U. R. 1924A, (N. D.) 325, and *Re Bay City Water Co.*, P. U. R. 1924E, (Ore.) 653, 1 per cent of gross income was allowed. In *Re Consumers Co.*, P. U. R. 1923A, (Idaho) 418, the average over a period of years was suggested as a practical method; while in *Re Pawnee Telephone Co.*, P. U. R. 1923C, (Neb.) 100, it was stated to be the duty of the rate-making authority to allow such deductions to the extent to which current accounts under good management turned out to be bad.

(d) Supervision.

There is involved in the activities of the "normal" commission firm an element totally disregarded by the Secretary's order, yet which is one of the outstanding elements of underlying cost. That is the cost, especially in view of the recent growth of detail in the live stock commission business, of supervising the efforts of salesmen, yard men, office force and others. That cost is entirely separate and distinct from selling, from yard salaries, from overhead as allowed by the Secretary, and from any of the other items discussed in the Secretary's

order. While it is an element of joint cost it is, none the less, definitely ascertainable. Many firms have office managers who do this work, and of course the branch organizations get it done in no other way than by employing a manager and fixing his salary by bargaining. These figures are tabulated both for the 11 firms having managers and for the 4 branch houses on page 32 *ante*, and show a per car cost of supervision or management for the 11 firms of $1.34 per car for cattle; $1.54 for hogs; $1.08 for sheep, and $1.38 for all species; and for the branches of $.94, $1.09, $.78 and $.96 respectively. This situation is no whit different in the case of the firms which do not have managers devoting their time exclusively to this work, with their salaries as such set up separately on the books. The cost is none the less there, and the testimony of witness Wood (R. 776) and others shows that where a member of the firm who is also a salesman looks after the duties of management, he does so in addition to the duties of salesman, in the time not devoted to salesmanship, and frequently at the cost of having to do two days work every day in the year.

(e) Invested Capital Omitted.

In this respect as in others the auditor and the Secretary followed the plan of accepting the firms' books where items which must be included in any lawful rate schedule were not set up, but disregarding them where in conflict with the Secretary's theory. Exhibit 107 (R. 798) shows without dispute that in addition to the capital, including memberships, set up in Exhibits 7-65 and allowed in the order, there are used in the business

by the members of petitioner firms, memberships having a total and undisputed value of $312,000.

5. The Order Seeks in Part to Justify General Rate Reduction by Authorizing a Special Increase, Which, Under the Undisputed Evidence, Can Not and Will Not Be Realized.

The Secretary's order, in paragraph 25 (R. 38) sharply critizes a provision in Tariff No. 1, which also, of course, appears in Tariff No. 2, for a half commission to regular yard traders and exchange members. The paragraph remarks that this lower rate is granted notwithstanding evidence that "planted" live stock is harder to sell than "fresh stuff." In paragraph 27 (R. 38 ff.) a rate is fixed which contains no such exception or special provision. The result therefore is, while not affirmatively requiring appellants to charge the same rate for seconds as for original sales, to authorize them to do so. And, of course, the inference is that they ought to, as a means of recouping some of the reductions otherwise incident to the Secretary's tariff.

The evidence shows, without any contradiction whatever, first, that the traders and speculators are a benefit to the market and its patrons, by providing a means of disposing of odd lots of live stock, by enabling each day's business to be taken care of without going over to congest the next day's, and by increasing the market's buying power; second, that the charging of a full rate would destroy or at least seriously cripple their business in that the difference in commission charged is ordinarily more than their net profit; and third, that the decrease in volume following a rate increase would more than

offset any gain from the increased rate. The witnesses all testified that they would favor the reduced rate, notwithstanding the authority to charge a full rate, and notwithstanding the other losses which the Secretary's tariff will impose upon them. Under the circumstances, therefore, it is apparent that this authorization will not increase petitioners' returns, and that in determining what the practical effect of the Secretary's tariff will be, it is necessary to disregard it. If the traders could manage to operate under the reduction, the net result would be a loss to shippers, in the form of an equivalent decrease in price.

It remains only to note that in criticizing this special rate, the Secretary ignores a fundamental principle in rate making, which is that an industry is justified in handling additional business, even at less than out of pocket unit cost, where to do so will not increase its ordinary or "actual" cost. This is particularly true of the type of business which, but for some such possibility, could not exist at all.

6. The Order Selects the Omaha Market, Notwithstanding Materially Higher Rates Under Substantially Similar Conditions, and in Disregard of the Undisputed Possibility of General Rate Fixation.

That the several terminal live stock markets are interdependent and that at least the entire west is part of the same shipping territory, does not admit of contradiction. St. Paul, Portland, Los Angeles, Denver, Wichita, Oklahoma City, Sioux City, Omaha, St. Joseph, Kansas City, St. Louis, Chicago and Fort Worth are all competitive, the one with each of the others. Shippers

anywhere west of the Mississippi River, ship to any one of three or four markets and find prices at an approximate level, allowing for the difference in freight rates. Most of the Omaha market's immediate competitors have a commission rate higher than Omaha's. If the Secretary deemed it his duty under the Act to adjust such rates, therefore, he should not have selected any one market on which to test their reasonableness. On the contrary, the whole commission fabric in competitive territory should have been discussed at one time. The Secretary should have proceeded as does the Interstate Commerce Commission when it desires to dissect any rate situation, by instituting a proceeding covering rates over a whole territory or group of territories affected, suggesting the specific changes in the rates deemed necessary, or proposing a new schedule of rates; and bringing all parties in for a hearing covering the entire territory, and a rate order which would not set up discriminations or attack piece-meal any one market rate fabric.

It is a fundamental principle of rate-making that industries operating under substantially similar conditions are entitled to charge the same rates and that an order of a regulating authority having jurisdiction of all is invalid if, without evidence of substantial dissimilarity, it fixes for one business or group a rate substantially less than that permitted others.

Hooker v. I. C. C., 188 Fed. 242.

I. C. C. v. Tennessee, etc. R. Co., 85 Fed. 107.

I. C. C. v. Cincinnati etc. R. Co., 56 Fed. 925.

So. R. Co. v. State R. Comm., 42 Ind. A. 90, 83 N. E. 721.

Turner Creamery Co. v. R. Co., 36 S. D. 310, 154 N. W. 819.

C. & N. W. Ry. Co. v. R. Com'n. 156 Wis. 47, 145 N. W. 216, 974.

The Secretary has himself recognized this principle when in *Re St. Paul Union Stock Yards Co.*, U. S. Dept. Agriculture, Packers & Stock Yards Administration, Docket No. 116, he dismissed a proceeding for the fixation of yard charges at that point on the ground that it was impossible to test the rates at St. Paul without a detailed investigation of charges elsewhere and of the stockyards situation generally.

7. The Order Is Based upon the Erroneous, Unconstitutional and Palpably Unjust Theory of a Rate Level, which will Eliminate Many of Appellants, Leaving the Remainder to Enjoy the Speculative Benefits Resulting Therefrom.

We think no time need be taken with discussion of the record in this connection. However appellees may seek to avoid its effect, and however earnestly they may invoke the law of the survival of the fittest as a prop to the right of regulation, the fact is apparent that the whole theory, upon which those who prepared the findings and rate schedule, and those at whose behest the schedule of lower rates was adopted, were proceeding, is that the live stock commission business is "overmanned;" and that, therefore, it is the function of the Secretary as the public official responsible to and mediating between all parties, to take the place of the law of supply and demand, the law

of the survival of the fittest, and all other economic laws, and impose a rate which would, by eliminating the "weaker" firms, confer untold benefits upon the survivors. That such was the deliberate intention upon which the Secretary's rate was built, cannot successfully be denied, in view of the record in this case. That such will be its effect is obvious, in view of the undisputed testimony.

In spite of the trial court's defense of it (R. 175) this is an erroneous and unconstitutional theory of rate-making, even if it were not palapably unfair and unjust. There are three observations concerning it which effectively dispose of any specious apology which may be made for it.

In the first place, the rate-making authority is concerned not with the question whether any business has or has not the right to survive, but with the intrinsic reasonableness of the rate as such, which he must build on the theory that all industries have a right to survive so long as they are managed with reasonable efficiency; and he may not, in the guise of a rate-maker, inject himself into the question of reasonably efficient management. This does not, by any means, imply that a rate is unreasonable merely because everybody can not survive under it; it does mean that a rate based on the intention of eliminating established concerns, without clear and conclusive proof of inefficient management or unreasonable expenditure, is inherently unsound, and the theory upon which it is based inherently fallacious.

In the second place, the benefits of such elimination of the "weak" for the benefit of the "strong" are purely

speculative, and would not accrue, even temporarily. The real concern of everyone connected with a regulated industry, and particularly its patrons, is the efficiency of the service rendered, provided the patron does not have to pay for that service more than its value under all the circumstances. To reduce rates for the purpose of eliminating a number of competitors does not by any means result in eliminating only those rendering their patrons the least efficient service. This will be apparent on a moment's reflection, even without the affirmative evidence in this record that under the Secretary's rate many of the oldest and best firms at Omaha will go down. Financial efficiency and efficiency of service are synonymous only when other things are equal. If everybody is insured a fair and reasonable rate, and fair practices are insured by the vigilance of the Exchange and the Government, then the patronage will tend to go to the firms rendering efficient service to their customers, and the ordinary operation of that factor will, in due course, eliminate those who for any reason are not able to render that type of service, whatever their financial acumen may be. But if a rate is imposed on the theory of eliminating enough industries to make the others prosper—whether the 20% or more estimated by Stryker, or the 50% which witnesses like Stewart, Tomlinson and Burke would like to see eliminated—the market at once becomes a scramble for business without regard to efficiency; the fact that some of the firms rendering their customers the best service must, none the less, collapse, destroys the whole basis upon which the market and the system of market practices are built up; the market becomes disorganized; the prime factor in maintaining it—

confidence of patrons in their brokers—is shattered, and patrons either go to some other market, or if the same is happening on all the live stock markets in the country, find some other means of marketing their live stock, probably to their own great disadvantage. And the attempt to maintain live stock commission rates at the level of the Secretary's order will inevitably have just that effect upon the Omaha and every other terminal market at which it is attempted.

But, thirdly, it is argued, in response to the suggestion that the theory of elimination might well be applied to reduce the number of men engaged in producing live stock, such action is not justified in the case of the producers because they are not organized for the purpose of maintaining their prices, while the petitioners are. There might be something in this argument if when rates are reduced and the process of elimination begins, there were any means whereby the shipper could be compelled to continue to patronize the Omaha market, so as to insure to the survivors the benefits which the Secretary wishes to confer upon them. There might be something in it if the commission men really had any such monopoly as the Secretary's order fallaciously suggests that they have. As a matter of fact, there is no analogy whatever between appellants' position, and that of utilities commonly regulated on the theory of "natural monopoly," such as railroads singly serving a given territory, or gas or electric companies singly serving a given municipality. In that case the patron has no recourse but to patronize the utility. In appellants' case the patron has many other means of getting his live stock sold. He may sell direct,—a practice which is growing, to the serious dam-

age of the industry. He may sell through an independent. He may sell through a cooperative. When a single cooperative handles from 6 5/10% to 10% of the entire business on the market, it would seem that the theory of "natural monopoly" reduces to absurdity, no matter how much it may be bolstered up by reference to the desirability of the service and the practical necessity of obtaining it only from petitioners. Finally, he may ship to another market, and whether defendants are right or not in defining the association through which appellants have initiated their own rates as monopolistic, it is certainly absurd to suggest that there is any such community of interest between them and their competitors at other markets, especially with appellants' rates much lower than they are at the two markets to which they are, in spite of their lower rates, steadily losing business.

The fact that under Tariff No. 2, since these proceedings began, two firms—Nos. 50 and 55—have gone out of business, while three—Nos. 26, 32 and 41—have consolidated with other appellants indicates that the object sought may safely be left, as it should be, to natural economic evolution.

And it is fundamental that rates cannot be fixed on the theory that the result will be to force any utility affected thereby out of business. Each utility is individually entitled to have its rates based on a fair return upon its capital invested and services rendered as a *going concern.*

Denver v. Denver Union Water Co., 246 U. S. 178;

Doherty & Co. v. Toledo R. & L. Co., 254 Fed. 597.

8. The Order is Based upon Irrelevant Considerations of the Economic Situation of Appellants' Patrons.

This, of course, has reference to the hundreds of pages of testimony from the presidents and secretaries of various western growers' associations (whose membership, according to the undisputed evidence, includes approximately 2% even of the western growers) as to the general situation of the live stock industry and the producers of live stock and to paragraphs 21 and 22 of the order which, without any basis whatever in the record, label appellants' hypothetical profits as excessive *per se*, apparently because the percentage of their profit to cost of handling and care is deemed greater than the producers' percentage of profit to cost of production.

All of these witnesses were testifying with reference to the proposed increase in Tariff No. 2, not to the rate structure generally. Their claim was in effect that live stock producers generally had suffered severe losses during the five years beginning in 1920, and that the producers represented by the witnesses were discouraged or irritated by the suggestion of increases in commission charges. No witness presumed to state that the commission rate is a controlling factor in the production and sale of live stock, much less that it had anything whatever to do with the losses incurred by the producers during the period in question. No witness attempted to weigh live stock commission charges as a factor in the producers' situation, against the numerous other factors

which affect it. Every witness admitted that, as far as his individual business was concerned, it was not important. The testimony that the commission rate is one of the least important, almost a negligible, factor in the producers' problem, therefore stands uncontradicted.

The rate initiated by appellants was about 9/10 of 1 per cent of the value of the product sold and the difference between it and that imposed by the Secretary—that is, the reduction imposed by the Secretary's order—somewhat less than 1/10 of 1%. It cannot be disputed that the reduction imposed will, none the less, put a large percentage of appellants out of business. It is conceded that the service performed by the petitioners is a valuable service without which the live stock business could not have reached its present state of security, without which it cannot hope to continue the prosperity restored without governmental aid since these proceedings began, without which it cannot continue to exist on the present basis at all. The question then is, can a rate reduction which will ruin many of the industries regulated, be justified because of the economic situation of their patrons, the entire rate being a minor, even a negligible factor in that situation?

We respectfully submit that this question can have but one answer. We do not for a moment mean to suggest that the economic situation of users is totally irrelevant to the fixation of reasonable rates. But it is relevant for one purpose only, namely, to test the value of the service, or more accurately speaking, to determine what rate the traffic will bear, using that term in the correct sense and without its usual hostility-pro-

voking connotations. That is, it is relevant for the purpose of determining the point at which rates, at their maximum, will stop the movement of patronage to the utliity. Only one witness attempted to fix that point: Witness Tagg testified that the movement of live stock into a market would not be affected by rates unless they were at least 1½ per cent of the value of the product—more than 50 per cent more than petitioners' present average rates. The economic situation of the user is never considered for the purpose of justifying a rate which will not repay the utility's costs; and it cannot be used as an excuse for imposing a rate which is less than the service is actually worth. As the Montana Commission remarked in *Butte v. Electric Ry. Co.*, P. U. R. 1921 C, 857, the rule as to the value of the service must not be distorted to destroy the rule of fair return; while the service may be worth nothing to the man who cannot pay, the utility may not be compelled to meet his necessities. And if corroboration be necessary, it is found in the fact that, notwithstanding the rate level at Chicago and Sioux City is higher than that now existing at Omaha, there has been during the last year or two a marked diversion of live stock business away from Omaha and to those markets.

If we but consider what really controls the situation, the truth of the proposition that the live stock commission rate is a negligible factor is apparent.

Of these factors probably the most important is the concentrated buying power of the packers who, witness after witness said, get all the live stock anyway—rail-

roads, yard companies, commission men, yard traders, and feeders, being only conduits whereby the live stock passes from the producer to the packer, who is the real intermediary between the producer and the ultimate consumer. On this record, and as a matter of which the Court can take judicial notice, it is fair to say that the principal aid to the producer, not only in getting a fair price for his product from this intermediary, but also in insuring fair treatment generally, have been the live stock commission merchants—the only group, since the great terminal markets were established, which has presented a united front in opposing buying skill with selling skill, in bettering market conditions, in establishing fair practices, and in fighting the producer's battle generally. As opposed to the concentrated buying power of the packer, the live stock commission merchant and his exchanges have been the only substitute for the organized producing and selling power which the producer ought to have but, unfortunately, has not. And when in the face of the situation as it actually exists, the governmental agency constituted for the protection of all parties, in lieu of attacking the real problem—concentrated buying vs. diffused selling power, plus a general economic situation which in 1925 was, but is no longer, adverse—regulates out of existence the agency whose charges are not only a negligible factor in the producer's economic situation, but whose services are the principal factor in such market prosperity and protection as he has, we respectfully submit that it gets the cart where the horse ought to be. If the commission business must ultimately be driven from the back seat, it should be only after the really controlling elements in the situation are dealt with.

We might enumerate a dozen other factors which were of more consequence, in analyzing the producers' situation and aiding his return to prosperity, than the rates charged by appellants. Freight rates themselves were, of course, a tremendous factor. Increased labor costs contemporaneous with decreased selling prices; inflated land values; borrowing cheap and repaying dear; shifting public tastes; increased taxes; direct selling; market competition; overproduction; general financial deflation and depression; and the whole problem of financing an industry through an era of falling prices: All these elements entered into and complicated the situation; and the Secretary's order, ostensibly taking some of them into account, was palpably entered in disregard of their controlling weight.

The authorities have condemned this method of approach to rate problems and this attitude of a rate making authority too often even for citation.

The power of the rate making body is to judge the intrinsic reasonableness of proposed rates and not their effect on the industry affected generally. While of course the rate making body has a right to consider the relation of the business, whose rates it is regulating, to the other interests which that business serves, and consider the industrial structure as a whole, it may do so only for the purpose of determining whether or not the rate fixed will be sufficiently remunerative to escape the condemnation of the Fifth and Fourteenth Amendments. That is, the rate making body may well consider the possible effect of a change in rates upon the prosperity of other industries which will be affected directly or in-

directly thereby, for the purpose of determining as certainly as may be, whether an increase in rates will diminish patronage to the point where the business will become unremunerative, or a decrease will increase the patronage to the extent necessary to make up the immediate loss in revenue, but it may not use the prosperity or want of prosperity of patrons as a reason for raising or lowering rates, or make the rate fixed depend upon the prosperity or want of prosperity of such patrons, much less lower the rate for the purpose of transferring to these patrons some part of the revenue which would otherwise be paid over to the business regulated. For such purposes, evidence of the financial condition of other industries related to the one regulated, or of the effect upon that condition of a change in rates, is wholly incompetent; and a rate fixed for such a purpose is wholly void.

Southern P. Co. v. Interstate Commerce Commission, 219 U. S. 433

Louisville & N. R. R. v. Interstate Commerce Commission, 195 Fed. 541, (rev. other grounds, 227 U. S. 88).

Considerations of public interest can not be invoked to compel a utility to maintain a non-compensatory rate.

Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585;

Hocking Valley R. Co. v. Public Utilities, 110 N. E. (Ohio) 952;

Reagan v. Trust Company, 154 U. S. 362.

Charges can not be regulated in proportion to the prosperity attending the industry, whose products the regulated industries handle.

Tift v. Southern Ry. Co., 138 Fed. 753, (affirmed 206 U. S. 428).

A utility can not be compelled to maintain a rate less than reasonable, on the ground of the public good.

Northern P. R. Co. v. North Dakota, 236 U. S. 585.

Nor can purely speculative benefits, which may follow a change in rates, justify a change in other rates promulgated by the utility on its own initiative.

North Hennepin Producers' Ass'n. v. C. St. P. M. & O. Ry. Co., 200 N. W. (Minn.) 808;

So. Pac. Co. v. I. C. C., 219 U. S. 433;

North Coast Power Co. v. Kuykendall, 201 Pac. (Wash.) 780;

Oklahoma-Colorado Potato Rates, 28 I. C. C. 298;

Allegheny Ore & Iron Co. v. C. & O. Ry. Co., 53 I. C. C. 415;

Board of Rd. Commsrs. of Kansas v. A. T. & S. F. Ry. Co., 22 I. C. C. 407;

Corn Belt Meat Producers Assn. v. C. B. & Q. Ry. Co., 14 I. C. C. 376;

Cenrtal Yellow Pine Assn. v. Illinois C. R. Co., 10 I. C. C. 505;

Revenues in Western Districts, 113 I. C. C. 3;

Wool Rates Investigation, 91 I. C. C. 235;

Kansas Public Utilities Com. v. A. T. & S. F. Ry. Co., 83 I. C. C. 105;

Rates and Charges on Grain and Grain Products, 91 I. C. C. 105.

In the case last cited, the Commission summarized the relative importance of a reduction in rates as compared with maintenance of adequate service, in language applying directly to the order here involved:

> *"That the benefit which would accrue to the average farmer in case of a reduction in rates is small compared with the aggregate disastrous effect on certain of respondents' revenues and on their credit, and there is serious doubt whether farmers would not in many instances lose from impaired railroad service more than they could possibly gain from a reduction in rates, even if the farmers would get the entire benefit of any reduction made."*

9. The Rates and Charges Prescribed in the Order Are Non-compensatory, Confiscatory, Unreasonable, Unjust and Unconstitutional when Tested by the General Situation Disclosed by the Record.

The trial court in its opinion correctly stated (R. 170) that the Secretary in fixing appellants' rates, like appellants themselves in initiating them, was charged with the duty of finding a rate high enough to compensate the efficient, low enough to keep out incompetents, within the margin of the value of the service to patrons, and on the whole just and reasonable. It is clear (1) that the Secretary made no effort to ascertain the value of the service; (2) that in adopting the cost of service basis, he used hypothetical and theoretical normals in disregard of actual costs; (3) that he omitted from his normal

cost schedule essential and basic cost items; (4) that the increase authorized as a partial palliative for general reduction will not be realized; (5) that he penalized appellants by selecting them on the sole pretext that he must begin somewhere; (6) that the intention and effect of the order was and will be to eliminate existing utilities; and (7) that in attempting to benefit the live stock industry, under a statute enacted for its benefit, he attacked a minor problem, leaving major economic factors untouched.

That the Secretary's order possesses these flaws has not yet been disputed, either by appellees or by the trial court. The attempt to meet them both by appellees and in the holding of the trial court (R. 171-6), when analyzed, reduces to two propositions:

1. That the Secretary was justified in adopting "reasonable costs," because there is such variation in costs of appellants as to make both averages and examples valueless.

2. That conceding the errors in the Secretary's cost schedule, both as to what is included and what is omitted, there is none the less a sufficient margin between the return to appellants under his rate and actual expenditures by them, to render the rates non-confiscatory.

As to the first of these arguments, the presumption that the Secretary's findings of fact are correct, as far as they go, and the limitations on such presumption, have already been discussed and are well understood. What is overlooked is that there is a similar, and much stronger, presumption as to the legitimacy and reasonableness of the expenditures actually made by the regu-

lated industries. It is quite true that averages in themselves have little meaning, but it does not follow that the are *per se* meaningless, as suggested in the lower court's opinion. If the examples used are typical, and if the number of examples available is sufficient, they have, at least, as great significance as a "reasonable cost" based on the performance of a commission firm, not only atypical but completely imaginary. The announced standard of "reasonable cost" was that of firms exhibiting "ordinary efficient management of their business." The announced standard of selling performance was that of salesmen employed by firms whose volume of business gave them the "proper opportunity to display their ability." All of the first class of firms must be included somewhere in the list of 56 appellants. Most, if not all, of the second class must be included among those doing an average or better volume of business. In any case, whether the firms be considered separately or in the aggregate, their actual performance and actual expenditures are presumptively correct for rate making purposes; and the regulatory authority cannot legally find such presumption overcome merely on ascertaining that their costs show variation. This is especially true when, as the record herein shows, the so-called variations are in fact normal incidents of the business regulated. A drouth in a given section, curtailing the business of a firm drawing the patronage therefrom and compelling it to advertise elsewhere in order to maintain its volume; producers going out of business, or changing from one species of live stock to another; growth in volume of driven-in and trucked-in shipments; shifts of patronage from market to market, and shifts in the volume of a given species at the same market; these are all normal

incidents of the live stock commission business. If they could have been reduced to constant factors it was the Secretary's duty to have done so; but if they could not, the problem thereby produced can not be disposed of by finding that the variation is so wide as to make cost accounting, on the basis of actual costs, too difficult. The difficulties of regulation are an excuse, neither for confiscation nor for unconstitutional methods.

If then we were to adopt the Secretary's cost of service theory, and attempt the construction of a rate thereon, upon the basis of actual facts, with the adoption of reasonable weights for unit costs of several items omitted, using the per car salesmanship cost of the "average or better" firms tabulated at **page 23** ***ante,,*** and correcting the other items, as indicated at **pages 28-34 and 74-82** ***ante,*** we should reach a revised cost schedule, as follows:

	C	H	S
Yardmen's salaries	1.75	1.50	1.50
Other salaries	2.35	1.95	2.15
Advertising and entertainment	2.70	2.20	2.95
Overhead, including bad debts	2.10	1.85	2.10
Exchange dues	.25	.25	.25
Total	9.15	7.75	8.95

	C	H	S
Salesmanship	6.62	4.75	6.23
Interest including additional capital and going concern value	1.00	1.00	1.00
Depreciation	.10	.10	.10
Supervision not included above	.59	.74	.43
Total	17.46	14.34	16.71

In this account should be substituted whatever a really scientific inquiry would determine the going concern value of petitioners' established business to be.

This per car cost extended for each species, totaled and then divided by the total business of the yards, gives a cost basis for the market as a whole of 16.43 per car. Obviously, if salesmanship were set up at the actual average for the "2,000 or more" firms as computed in the tabulation at page 23 *ante,* there would have to be added $.98 for cattle, $.66 for sheep, and $.42 for hogs, bringing the actual selling cost to $18.44 for cattle, $15.00 for hogs and $17.13 for sheep, or a general cost basis for the entire market of $17.10 per car; and an actual average for appellants as a whole would be still higher. A cursory reference to Exhibit 111 (R. 798) is all that is needed to show that petitioners' actual out-of pocket expenditures per car are moderate as compared with the reasonable cost which would have to be set up on any fair application of the cost of service theory to the construction of a rate base. Nor is it necessary to quibble over details or to spend much time in arguing whether such allowances as the one made by the Secretary for advertising and entertainment are "reasonable." Appellants could submit to substantial reduction of any of these items and the cost basis, on a valid application of the Secretary's own theory, would still be in excess of the actual expenditures as shown by the books, and tabulated in Exhibit 111; even after allowing for any reasonable revision of the Secretary's $5000-$4000-$5000 salary basis.

As to the profit which should be added to this cost base, all that is necessary is to refer to the Secretary's

own finding, paragraph 13 of his order (R. 31) as to average commissions per car, under Tariff No. 1, to reach the conclusion that Tariff No. 2 includes an extremely moderate average margin between cost of service and the charge paid by patrons.

To the second argument, that despite its flaws the Secretary's rate still leaves a sufficient margin over actual expenditures, there are two severally conclusive answers:

In the first place, if the rate was erroneously arrived at it can not be validated on the ground that pursuing a correct method might have reached the same result. In *Louisville & Nashville R. Company v. Greene,* 244 U. S. 522, this Court was dealing with a valuation fixed by a state board of equalization for tax purposes, which the lower court had upheld, saying that though the Board had proceeded erroneously in finding the fair cash value of the appellant's property within the state, its finding would none the less be upheld on the ground that "if they had gone at it in the right way, they would have found such to be the value thereof." Reversing the decision, this Court said:

> "This rough-and-ready reasoning had the effect of depriving plaintiff of the benefit of having controlled mileage taken into consideration in making the apportionment, instead of operated mileage only; and this because of the assumption that the same valuation reached by the Board through an erroneous method possibly might have been reached had they pursued a correct method. We think the court here fell into error. It being shown that the valuation made by the Board was the result of following

a method substantially eroneous because not in accordance with the statute, there is no presumption that a like valuation would have been reached by following a correct method. As the difference is so great—more than $27,000,000—there is a strong presumption to the contrary. If any of the facts necessary to enable the court to determine what result would have been reached by the application of a correct method were absent from the record, the court might have opened the proofs, in its discretion; otherwise it should have proceeded to base its judgment upon such proofs as already were in the record. The result of the method adopted in making up the decree was to deprive plaintiff of the relief it was entitled to, upon the basis of the facts as found, because of a surmise that, upon other facts not shown by the record, a conclusion sustaining the Board's action might have been reached."

This Court held to the same effect, as to the failure of the Interstate Commerce Commission in fixing the value of property devoted to transportation, to take into consideration reproduction costs, in *St. Louis & O'Fallon R. Co. v. United States,* October Term 1928, Nos. 131, 132, 73 L. Ed. Advance Opinions 457, where the Court said:

"Unfortunately, proper heed was denied the timely admonition of the minority: 'The function of this commission is not to act as an arbitrator in economics, but as an agency of Congress, to apply the law of the land to facts developed of record in matters committed by Congress to our jurisdiction.'"

* * *

"It was deemed unnecessary by the Court below to determine whether the Commission obeyed the statutory direction touching valuations since the order permitted the O'Fallon to retain an income great enough to negative any suggestion of actual confiscation. With this we can not agree. Whether

> the Commission acted as directed by Congress was the fundamental question presented. If it did not, the action taken, being beyond the authority granted, was invalid. The only power to make any recapture order arose from the statute."

And, of course, where the findings of a regulating body are not sufficient to sustain its rate order, this court will not examine the evidence and make findings to sustain it.

> *I. C. C. vs. C. B. & Q. Ry. Co.*, 186 U. S. 320;
>
> *Louisville & Nashville Ry. Co. v. Behlmer*, 175 U. S. 648;
>
> *Texas and Pacific Ry. Co. v. I. C. C.*, 162 U. S. 197.

Nor can resort be had to the opinion of the lower court to eke out the findings of fact of the rate making authority.

> *Kendrick vs. Commissioner*, 29 Fed. (2d) 559,

and opinions of this Court there reviewed.

The second answer to the contention as to the margin still available to appellants under the Secretary's order is that the actual facts show such margin to be grossly and unjustly insufficient. The following tabulation shows what, after paying actual expenditures, the appellants both individually and in the aggregate will have left out of the income which the Secretary's order will produce:

FOLD OUT IS TOO LARGE TO BE FILMED

FIRM NO.	FIRM NAME	NO. CARS HANDLED 1925	COMMISSIONS UNDER SECRETARY'S ORDER Total	COMMISSIONS UNDER SECRETARY'S ORDER Per Car	EMPLOYEE SALESMEN'S AND BUYERS' SALARIES Total	EMPLOYEE SALESMEN'S AND BUYERS' SALARIES Per Car	YARDMEN'S SALARIES Total	YARDMEN'S SALARIES Per Car	OTH SALA Total
1	Bryson Bros.	2,466.99	$ 37,508.15	15.33	$ 7,800.00	3.19	$ 1,511.00	.62	$ 4,796.
2	Byron Clow	1,233.06	18,781.60	15.23	2,700.00	2.19	1,151.66	.93	2,923.
3	Farris Marcy Co.	1,738.39	26,608.60	15.31	11,257.50	6.48	2,717.50	1.56	1,952.
4	Interstate Live Stock Commissio	4,206.38	64,899.20	15.43	8,535.00	2.03	4,128.75	.98	11,270.
5	Adams Bros. & Ihnen	1,255.79	18,953.55	15.09	2,640.00	2.10	1,605.20	1.28	1,250.
6	Randall & Co.	1,907.72	30,143.85	15.80	2,400.00	1.26	1,356.00	.71	4,305.
7	W. R. Smith & Son	1,917.12	34,885.80	18.18	2,700.00	1.41	2,975.00	1.55	5,964.
8	Wood Brothers	5,251.35	81,597.51	15.54	14,925.00	2.84	8,049.00	1.53	10,350.
9	Bowles Livestock Co.	4,609.66	69,087.80	14.99	13,175.00	2.86	6,275.41	1.36	5,201.
10	Clifton Commission Co.	1,181.80	18,423.55	15.59	6,800.00	5.75	1,600.00	1.35	204.
11	Dworak-Stolinski Co.	779.80	12,171.52	15.61	1,500.00	1.92	404.00	.52	57.
12	Ingwersen & Daugherty	1,126.09	17,045.80	15.14	4,909.33	4.36	26.00	.02	3,305.
13	Lindley Cahow Commission Co.	6,547.17	105,054.99	16.05	27,325.77	4.17	10,676.00	1.63	9,691.
14	John Ralston Commission Co.	2,750.38	40,674.20	14.79	19,496.81	7.09	2,112.50	.77	3,061.
15	Security Livestock Commission	1,105.09	16,412.10	14.85	6,300.00	5.70	1,525.00	1.38	1,602.
16	Winn Brothers	418.67	6,019.00	14.38	.....	.....	1,325.00	3.16	3.
17	Boetel Livestock Commission C	544.52	8,537.05	15.68	.....	.....	.....	.....	1,510.
18	John Clay	6,400.72	102,579.90	16.03	32,600.00	5.09	11,748.27	1.84	19,170.
19	Allen Dudley & Co.	2,138.74	32,486.90	15.19	7,210.00	3.37	2,281.70	1.07	2,395.
20	Greene Madden & Co.	1,450.55	21,725.45	14.98	2,400.00	1.66	3,000.00	2.07	1,537.
21	Lee Livestock Commission Co.	1,131.54	17,189.60	15.19	1,800.00	1.59	1,819.00	1.61	1,899.
22	Omaha Livestock Commission	3,506.39	52,991.99	15.11	12,500.00	3.57	2,250.00	.64	5,050.
23	Rosenbaum Bros. & Co.	2,416.85	38,398.20	15.89	22,463.34	9.29	7,070.75	2.93	6,923.
24	Williams & Son	478.01	9,362.20	19.59	.....	.....	1,529.05	3.20	1,581.
25	Bliss, Wellman & Hopkins	2,534.39	37,227.10	14.69	7,367.50	2.91	4,438.50	1.75	8,114.
27	Donahue Bros., Inc.	2,109.28	34,095.20	16.16	5,562.50	2.64	4,217.50	2.00	4,164.
28	Great Western Commission Co.	5,458.27	84,235.15	15.43	21,871.90	4.01	7,929.91	1.45	21,654.
29	Laverty Bros.	2,134.38	32,324.70	15.14	12,595.00	5.90	1,890.00	.88	2,299.
30	Mutual Livestock Commission Co.	3,952.25	59,639.90	15.09	10,337.50	2.62	6,099.16	1.54	4,247.
31	Chas. O. Robinson & Co.	2,919.07	44,571.70	15.27	24,104.09	8.26	5,972.50	2.05	11,018.
32	Ward Murphy Livestock Commission Co.	747.23	10,431.80	13.96	2,000.00	2.68	979.78	1.31	696.
33	Bliss & Son	1,130.09	17,405.60	15.40	6,400.00	5.66	875.00	.77	2,064.
34	Byers Bros. & Co.	3,486.41	55,979.80	16.06	21,120.00	6.06	5,547.00	1.59	9,358.
35	W. F. Denny & Co.	1,447.51	22,377.15	15.46	6,537.50	4.52	2,270.00	1.57	2,186.
36	Gant Livestock Commission Co.	249.49	4,668.20	18.71	.....	.....	1,725.00	6.92	974.
37	Laird Livestock Commission Co.	910.84	14,217.50	15.61	2,430.00	2.67	2,190.00	2.40	2,173.
38	Melady Bros.	2,803.71	42,108.10	15.02	12,551.15	4.47	5,402.50	1.93	7,385.
39	Roberts Bros. & Rose	6,572.40	101,454.50	15.44	14,310.00	2.18	12,602.70	1.92	13,953.
40	Triangle Livestock Commission Co.	2,234.20	34,753.15	15.56	3,000.00	1.34	4,800.00	2.15	3,241.
41	Lou Bick Livestock Commission Co.	1,260.20	19,762.05	15.68	.....	.....	2,366.00	1.88	2,495.
42	Burke-Rickley Co.	1,548.98	22,876.55	14.77	.....	.....	2,100.00	1.36	2,153.
43	Cox Jones Commission Co.	5,073.12	77,936.65	15.36	18,935.00	3.73	6,107.00	1.20	18,326.
44	Frazer Johnson Co.	1,648.12	26,100.45	15.84	9,300.00	5.64	2,445.25	1.49	4,328.
45	Jacob Jacobs Livestock Commission Co.	907.36	13,863.35	15.28	4,630.00	5.10	2,713.00	2.99	2,993.
46	Martin Bros. & Co.	3,263.33	51,589.30	15.81	19,528.33	5.99	3,375.00	1.03	8,674.
47	L. E. Roberts & Co.	994.69	14,650.60	14.73	4,555.00	4.58	665.00	.67	2,992.
48	Tagg Bros. & Moorhead	5,132.03	83,431.50	16.26	7,350.00	1.43	7,236.00	1.41	18,300.
49	Geo. M. Wood Sheep Commission Co.	307.38	5,511.00	17.93	.....	.....	1,243.00	4.05	82.
51	Alex B. Buchanan & Son	1,852.16	27,110.65	14.64	6,480.00	3.50	1,210.00	.65	1,58.
52	Corn Belt Commission Co.	1,901.15	29,178.36	15.35	11,255.35	5.92	338.33	.18	2,20.
53	Fonda, Kells & Christie Co.	1,798.52	27,793.30	15.45	1,840.00	1.02	1,500.00	.84	3,18.
54	Jackson Livestock Co.	882.11	13,751.90	15.59	7,180.00	8.14	467.00	.53	77
56	Record Livestock Commission Co.	2,365.97	36,566.00	15.46	4,571.65	1.93	4,560.00	1.93	3,08
	Malone, Coffman Co.	833.63	12,680.80	15.21	2,100.00	2.52	1,460.00	1.75	1,54
		1,028.23	31,900.25	15.96	7,140.00	3.57	1,576.10	.79	1,6

(TABLE F HERE)

The Secretary's finding as to reasonable selling costs produces an average of $4.20 per car for the three species. Employee-salesmen's and buyers' salaries, as above tabulated, amount to $471,572.65, and these actual expenditures are nowhere in the evidence or order shown excessive or even criticized. The per car average over all species is $3.69. This total does not include any selling services performed by owners. Out of the finding as to reasonable cost of selling per car, therefore, there is left 51c per car, or about $64,000 for the 127,811.99 cars handled, to pay for the selling services of 93 13/20 owner-salesmen (*ante*, p. 27)). The 148 7/30 employed salesmen, (*ante*, p. 27) received an average of slightly under $3200.00 per year; this is not only not criticized as excessive, but a reasonable salary for a competent salesman is set up at a much higher figure; but the owners, whose skill and experience are naturally infinitely superior, are allowed for their services as salesmen, if the finding as to reasonable cost per car were applied directly to the situation as it exists, approximately $700.00 each per year.

No such rule of thumb application need, however, be made. After paying actual expenses, appellants, as a whole, have left $355,571.38. This does not make deduction for going concern value, supervision not included in "other salaries" or elsewhere in the books and audits (ante p. 31), or bad debts or other unpredictable losses. These are none the less out-of-pocket costs, which must be deducted before the owners have anything left for their own selling services and risk of business as such, to say nothing of "profit."

It does not essentially matter how these items are set up. Supervision not already included averages 63c per car (*ante*, 82, 101)) or $80,535.75. If we assume that bad debts would amount to 1% of commissions earned, or $19,834.33 (which would be moderate in a business involving nearly $200,000,000.00 worth of livestock per year), we should have $100,370.08 to set up as additional normal costs on account of those two items alone. Appellants would then have left $255,201.30, with no deduction yet made for going concern value, the return on which is part of the normal cost of doing business. In any case they would have left slightly less than $2.00 per car, out of which to reimburse themselves for going concern value, pay their salaries as salesmen and compensate themselves for the risk of the business as such.

If the 60 2/5 owner cattle salesmen, 26.5 owner hog salesmen and 6¾ owner sheep salesmen (*(ante*, p. 27)) were to be paid at the Secretary's normal selling salaries, they would be entitled to receive $441,750.00 for selling services alone. But it is not necessary to press the comparison even that far. The 27 "average or better" firms heretofore referred to, have 30 10/12 owner cattle salesmen, 15 owner hog salesmen and 3 owner sheep salesmen. These have that "opportunity to demonstrate their ability," which is the Secretary's standard of selling performance. On that basis they would be entitled to $229,166.66 for selling services only. What they actually have left out of the business, after paying actual costs, is shown in the following tabulation:

FIRM NO.	FIRM NAME	NO. CARS HANDLED 1925	COMMISSIONS UNDER SECRETARY'S ORDER Total	Per Car	EMPLOYEE SALESMEN'S AND BUYERS' SALARIES Total	Per Car	YARDMEN'S SALARIES Total	Per Car	OTHER SALARIES Total	Per
1	Bryson Bros.	2,466.99	$ 37,508.15	15.33	$ 7,800.00	3.19	$ 1,511.00	.62	$ 4,796.47	1.
4	Interstate Live Stock Commission Co.	4,206.38	64,899.20	15.43	8,535.00	2.03	4,128.75	.98	11,270.96	2.
6	Randall & Co.	1,907.72	30,143.85	15.80	2,400.00	1.26	1,356.00	.71	4,305.10	2.
7	W. R. Smith & Son	1,917.12	34,885.80	18.18	2,700.00	1.41	2,975.00	1.55	5,964.00	3.
8	Wood Brothers	5,251.35	81,597.51	15.54	14,925.00	2.84	8,049.00	1.53	10,350.00	1.
9	Bowles Livestock Co.	4,609.66	69,087.80	14.99	13,175.00	2.86	6,275.41	1.36	5,201.10	1.
13	Lindley Cahow Commission Co.	6,547.17	105,054.99	16.05	27,325.77	4.17	10,676.00	1.63	9,691.97	1.
14	John Ralston Commission Co.	2,750.38	40,674.20	14.79	19,496.81	7.09	2,112.50	.77	3,061.15	1.
18	John Clay	6,400.72	102,579.90	16.03	32,600.00	5.09	11,748.27	1.84	19,170.00	3.
19	Allen Dudley & Co.	2,138.74	32,486.90	15.19	7,210.00	3.37	2,281.70	1.07	2,395.57	1.
22	Omaha Livestock Commission Co.	3,506.39	52,991.99	15.11	12,500.00	3.57	2,250.00	.64	5,050.40	1.
23	Rosenbaum Bros. & Co.	2,416.85	38,398.20	15.89	22,463.34	9.29	7,070.75	2.93	6,923.65	2.
25	Bliss, Wellman & Hopkins	2,534.39	37,227.10	14.69	7,367.50	2.91	4,438.50	1.75	8,114.95	3.
27	Donahue Bros., Inc.	2,109.28	34,095.20	16.16	5,562.50	2.64	4,217.50	2.00	4,164.20	1.
28	Great Western Commission Co.	5,458.27	84,235.15	15.43	21,871.90	4.01	7,929.91	1.45	21,654.96	3.
29	Laverty Bros.	2,134.38	32,324.70	15.14	12,595.00	5.90	1,890.00	.88	2,299.60	1.
30	Mutual Livestock Commission Co.	3,952.25	59,639.90	15.09	10,337.50	2.62	6,099.16	1.54	4,247.99	1.
31	Chas. O. Robinson & Co.	2,919.07	44,571.70	15.27	24,104.09	8.26	5,972.50	2.05	11,018.60	3.
34	Byers Bros. & Co.	3,486.41	55,979.80	16.06	21,120.00	6.06	5,547.00	1.59	9,358.46	2.
38	Melady Bros.	2,803.71	42,108.10	15.02	12,551.15	4.47	5,402.50	1.93	7,385.81	2.
39	Roberts Bros. & Rose	6,572.40	101,454.50	15.44	14,310.00	2.18	12,602.70	1.92	13,953.80	2.
40	Triangle Livestock Commission Co.	2,234.20	34,753.15	15.56	3,000.00	1.34	4,800.00	2.15	3,241.00	1.
43	Cox Jones Commission Co.	5,073.12	77,936.65	15.36	18,935.00	3.73	6,107.00	1.20	18,326.15	3.
46	Martin Bros. & Co.	3,263.33	51,589.30	15.81	19,528.33	5.99	3,375.00	1.03	8,674.18	2.
48	Tagg Bros. & Moorhead	5,132.03	83,431.50	16.26	7,350.00	1.43	7,236.00	1.41	18,300.00	3.
56	Record Livestock Commission Co.	2,365.97	36,566.00	15.46	4,571.65	1.93	4,560.00	1.93	3,088.06	1.
58	Wood-Oswald	1,998.23	31,900.25	15.96	7,140.00	3.57	1,576.10	.79	4,686.90	2.
		96,136.51	$1,498,121.49	15.58	$361.475.54	3.76	$142,188.25	1.48	$226,695.03	2.

IER ARIES		ADVERTISING TRAVEL AND ENTERTAINMENT		EXCHANGE ASSESSMENTS AND DUES		OTHER EXPENSES		OTHER DEDUCTIONS		ADDITIONAL RENT		TOTAL ACTUAL OUTLAY	
	Per Car	Total	Per Car	Total	Per Car	Total	Per Car	Total	Per Car	Total	Per Car	Total	Per Car
.47	1.96	$ 6,489.51	2.65	$ 482.74	.20	$ 3,423.04	1.40	$ 28.37	.01	$1,013.04	.41	$ 25,556.92	10.44
.96	2.68	11,600.33	2.76	1,135.00	.27	4,706.84	1.12	156.73	.04	1,411.56	.34	42,945.17	10.21
.10	2.26	4,962.24	2.60	659.88	.34	3,741.08	1.96	348.38	.18	759.78	.40	18,532.46	9.71
.00	3.11	8,957.60	4.67	310.10	.16	3,497.66	1.82	1,757.50	.92	687.42	.36	26,849.28	14.01
.00	1.97	26,971.65	5.14	1,307.05	.25	10,566.29	2.01	1,898.61	.36	1,700.46	.32	75,768.06	14.43
.10	1.13	10,638.21	2.31	1,183.39	.26	7,343.16	1.59	525.21	.11	1,700.46	.37	46,041.94	9.99
.97	1.48	14,793.67	2.26	1,542.19	.24	9,759.97	1.49	1,786.77	.27	976.86	.15	76,553.20	11.69
.15	1.11	5,309.24	1.93	677.12	.25	2,959.18	1.08	517.30	.19	506.52	.18	34,639.82	12.59
.00	3.00	27,035.51	4.22	1,520.75	.24	10,926.74	1.71	755.04	.12	3,979.80	.62	107,736.11	16.83
.57	1.12	3,424.07	1.60	327.85	.15	3,259.47	1.52	40.29	.02	941.22	.44	19,799.59	9.26
.40	1.44	6,545.55	1.87	872.08	.25	5,134.74	1.46	.....	.....	1,013.04	.29	33,365.81	9.52
.65	2.86	9,195.74	3.81	663.65	.27	4,783.28	1.98	188.67	.08	1,222.56	.51	52,511.64	21.73
.95	3.20	4,664.56	1.84	459.21	.18	4,852.88	1.92	59.18	.02	940.68	.37	30,897.46	12.19
.20	1.97	4,682.83	2.22	618.57	.29	4,314.91	2.05	21.50	.01	940.68	.44	24,522.69	11.63
.96	3.97	12,387.72	2.27	1,281.04	.23	6,256.39	1.15	618.94	.11	2,460.24	.45	74,461.10	13.64
.60	1.08	3,388.74	1.59	621.10	.29	1,517.94	.71	.....	.....	1,013.58	.47	23,325.96	10.93
.99	1.08	5,992.86	1.51	878.31	.22	3,748.68	.95	587.59	.15	1,193.94	.30	33,086.03	8.37
.60	3.78	7,423.91	2.54	804.32	.28	7,215.40	2.47	1,065.87	.36	2,387.88	.82	59,992.57	20.55
.46	2.69	6,690.19	1.92	777.34	.22	4,769.94	1.37	29.09	.01	1,013.04	.29	49,305.06	14.14
.81	2.63	7,084.87	2.53	578.72	.21	4,074.51	1.45	1,070.46	.38	1,121.58	.40	39,269.60	14.01
.80	2.12	23,686.73	3.61	1,456.59	.22	10,877.54	1.65	7.47	.....	1,989.90	.30	78,884.73	12.00
.00	1.45	7,877.50	3.53	483.79	.22	2,549.00	1.14	7.03	.....	955.26	.43	22,913.58	10.26
.15	3.61	10,938.20	2.16	998.45	.20	4,107.61	.81	141.42	.03	1,013.04	.20	60,566.87	11.94
.18	2.66	6,532.16	2.00	724.10	.22	4,829.43	1.48	84.40	.03	1,303.02	.40	45,050.62	13.81
.00	3.57	13,376.45	2.60	1,068.90	.21	8,955.42	1.75	511.55	.10	1,230.12	.24	57,005.34	11.11
.05	1.31	4,242.34	1.79	620.19	.26	2,760.76	1.17	154.27	.06	470.34	.20	20,467.61	8.65
.90	2.34	5,378.74	2.70	597.37	.30	5,842.45	2.92	130.40	.07	1,085.40	.54	26,437.36	13.23
.03	2.36	$260,271.12	2.71	$22,649.80	.24	$146,774.31	1.53	$11,401.11	.12	$35,031.42	.36	$1,206,486.58	12.55

Car	INTEREST ON INVESTMENT Total	Per Car	INTEREST ON INVESTMENT OMITTED Total	Per Car	DEPRECIATION OMITTED Total	Per Car	TOTAL FOR SERVICES AND RISK Total	Per Car
44	$ 967.02	.40	$ 560.00	.23	$		$10,436.96	4.26
21	1,578.35	.37			326.30	.08	20,049.38	4.77
71	546.42	.29					11,064.97	5.80
01	1,301.54	.68	560.00	.29			6,174.98	3.22
43	3,131.16	.60	1,960.00	.37			738.29	.14
99	3,979.17	.86					19,066.69	4.14
59	1,323.23	.20	1,120.00	.17			26,058.56	3.98
59	3,834.48	1.39	280.00	.10	132.50	.05	1,787.40	.65
83	475.83	.07	2,800.00	.44	125.18	.02	8,557.22	1.34
26	526.47	.25	560.00	.26	114.45	.05	11,486.39	5.37
52	1,620.99	.46	280.00	.08			17,725.19	5.06
73	238.64	.10					14,352.08	5.94
19	975.06	.39					5,354.58	2.11
53	1,452.39	.69					8,120.12	3.85
64	3,661.80	.67	280.00	.05	653.41	.12	5,178.84	.95
93	121.33	.06			100.00	.05	8,777.41	4.11
37	709.82	.18	560.00	.14			25,284.05	6.40
55	567.78	.19			542.06	.19	16,530.71	5.66
14	1,407.29	.40			225.00	.06	5,042.45	1.45
01	724.41	.26					2,114.09	.75
00	866.40	.13					21,703.37	3.30
26	741.27	.33	840.00	.38	488.52	.22	9,769.78	4.37
04	2,285.49	.45					15,084.29	2.97
31	3,307.72	1.01	1,400.00	.43	73.27	.02	1,757.69	.54
11	3,090.87	.60	1,680.00	.33			21,655.29	4.22
65	1,109.58	.47			865.25	.37	14,123.56	5.97
23	978.55	.49			364.17	.18	4,120.17	2.06
65	$41,523.06	.43	$12,880.00	.13	$4,010.11	.04	$233,234.49	2.43

(TABLE G HERE)

And again it must be noted that bad debts, going concern value, and supervision (except in the one or two instances where employed) are yet to be taken care of, before we reach "profits".

The actual facts, however, are still more striking. The foregoing tables assume the receipt by appellants of the *total possible revenue* under the Secretary's order. As the undisputed evidence shows, however, they will not receive the authorized increase on "seconds," which will result in a total reduction in actual revenue received, to all firms, of $62,172.19, (Ex. 103, R. 798). The actual total to all appellants for going concern value, bad debts, omitted supervision, selling services and risk of business or "profit" is therefore but $293,400.19 or $2.29 per car. The actual net balance on the foregoing basis to each of the 27 "average or better" firms will be as follows:

Firm		Per Car
1	$ 9,166.43	$ 3.74
4	17,583.83	4.18
6	10,339.27	5.47
7	6.164.18	3.21
8	1,638.53	.31
9	18,117.17	3.93
13	24,465.84	3.73
14	98.05	.03
18	9,620.74	1.50
19	8,156.69	3.81
22	15,829.35	4.51
23	15,115.68	6.25
25	2,793.30	1.10
27	8,016.11	3.80
28	4.760.21	.87
29	7,314.70	3.43
30	20,613.49	5.21
31	18,087.02	6.19
34	1,832.35	.52
38	737.94	.22
39	18,562.33	2.82
40	9,121.54	4.08
43	14,197.35	2.79
46	1,171.31	.36
48	19,941.97	3.88
56	13,660.26	5.77
58	3,789.31	1.89
	$191,774.91	$ 1.99

Firm	Per Car

The foregoing figures dispose of any suggestion, which may be made herein, that appellants are merely a group who show a failure to realize a profit in the aggregate, such as was referred to, although not directly passed upon, in *Aetna Insurance Com-*

pany v. Hyde, 275 U. S. 440. Most of the individual results above tabulated are so low as to speak for themselves. But if we apply the proper analysis to any individual firm, as the regulating authority should have done in this case, deduct the omitted items, and make any adjustment which the special conditions, if any, affecting a particular business may warrant, we still encounter the same deficit in each case; keeping in mind that in such process we seek what the Secretary should have sought—true balances—what the owners have left after paying the items on their books meaning nothing until all deductions, which should have been set up as part of a sound rate base, have been taken into account.

It must be noted that the Secretary allowed a margin of "profit" after setting up his cost schedule, of but $1.75, $2.15 and $1.95 per car for cattle, hogs and sheep respectively (R. 36). Appellants' business is one in which normal variations are many and important. Not only are crop, weather and other conditions unpredictable; but shifts of patronage from market to market, and the effects of changes in public taste and other developments in the business of meat production are drastic and far reaching. These factors create conditions which make the service rendered extremely valuable and the risk of those rendering the service extremely great. These conditions not only justify but require a rate high enough to compensate for the risk assumed in entering and continuing in the business. The Secretary's margin of "pure profit" is so narrow as to be palpably absurd and unjust.

Finally, it must be noted herein that the special master in his report (R. 57-145) sets forth the processes whereby he arrived at his conclusion that the rate is confiscatory. No doubt the Secretary went through some process of analysis and investigation before he arrived at his own conclusion. Those who conducted that process for him did not take the witness stand, and the process remains, as it did in the beginning, shrouded in mystery. In that state of the record the burden should rest upon appellees to show that the process adopted by the Secretary is sound and that adopted by the master, and the conclusions thereby reached, unsound. The overwhelming weight of the evidence shows that his findings were correct, whether the problem be approached from the point of view he adopted, or from any other presented by the record herein.

———o———

CONCLUSION.

To summarize: The underlying statute as applied to personal services such as those rendered by petitioners is unconstitutional.

The statute itself confers no power upon the Secretary to make an order compelling a market agency to follow the rate schedule prescribed by him.

The court has full power and jurisdiction to review the Secretary's order and determine not only whether it was within the powers conferred upon him, but also whether or not it was unsupported by substantial evidence, whether it disregarded undisputed evidence, and whether, considering the evidence as a whole, it deprived appellants of their constitutional rights.

The rates prescribed in the order are unreasonable, non-compensatory and unfair, and confiscate petitioners' property rights in the capital used in their businesses, and in the skill, experience and personal services devoted thereto. The order disregards accepted standards of rate-making. It not only adopts an inherently fallacious standard, but proceeds by erroneous and unconstitutional methods to arrive at a theoretical selling cost, in disregard of the actual facts. It disallows reasonable and necessary expenses without proof of abuse of discretion by appellants. It omits items of basic cost, essential to a valid rate. It is based upon irrelevant considerations of the economic situation of appellants' patrons, invokes questions of public policy having no connection with the inherent reasonableness of appellants' rates, and is based upon complete misunderstanding of appellants' economic

function, and complete disregard of the really controlling factors in the industry they serve. It is based upon the unconstitutional theory of deliberate elimination by rate-making of established industries. It justifies radical reductions on the theory of purely speculative increases which the undisputed evidence shows cannot be realized. It arbitrarily selects the market served by appellants as a place to begin commission rate revision, notwithstanding the vital relation of the markets with each other, and in disregard of precedents established by the Secretary himself. It prescribes a rate which is generally unreasonable, considered in relation to the record as a whole and the general situation disclosed thereby. It ruins many appellants outright, and deprives the remainder of the chance to earn a fair living in the vocation to which their whole lives have been devoted, and their right to follow which is both an inherent and a vested one. Even the cost of service theory, properly applied, with a reasonable profit added, would result in a rate base which makes Tariff No. 2 unquestionably reasonable.

The decision of the district court should be reversed with directions to grant a permanent injunction.

Respectfully submitted,

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APPENDIX

THE STATUTES INVOLVED.

The powers of the Secretary of Agriculture, by virtue of which the order sought to be suspended was issued in this case, are defined in Secs. 309 and 310 of the Packers & Stockyards Act (Act of August 15, 1921, C-64, 42 St. L. 165; U. S. C. 1925, Title 7, Chapter 9, Secs. 210 and 211) which are as follows:

"210. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereafter in this section referred to as the 'defendant') in violation of the provisions of sections 205, 206, 207, or 208 of this chapter, or of an order of the Secretary made under sections 201 to 217, inclusive, of this chapter, may, at any time within ninety days after the cause if action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be specified by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the livestock commissioner, board of agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall in-

vestigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the secretary, by any provision of section 201 to 217, inclusive, of this chapter, or concerning which any question may arise under any of the provisions of sections 201 to 217, inclusive, of this chapter, or relating to the enforcement of any of the provisions of sections 201 to 217, inclusive, of this chapter. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secreatry determines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court hav-

ing general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit. (Aug. 15, 1921, c. 64, Sec. 309, 42 Stat. 165).

"211. Whenever after full hearing upon a complaint made as provided in section 210 of this chapter, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory. The Secretary—

(a) May determine and prescribe what will be the just and reasonable rate or charge, or rates or charges to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and non-discriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum

> or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed. (Aug. 15, 1921, c. 64, Sec. 310, 42 Stat. 166)".

It will be noted that under the foregoing section a distinction is made between orders promulgating schedules of rates and orders finding that reparation is due individuals—the same distinction which prevails throughout the acts regulating commerce. Other sections give the Secretary power to prescribe rates and practices, to prevent discrimination between intrastate and interstate commerce, and to prevent unfair, discriminatory or deceptive practices. All of these, like orders setting up rate schedules generally, are subject to the same distinction as compared with orders requiring the payment of money to individuals. This distinction is given express sanction by Section 313 of the Act (U. S. C. 1925, Title 7, Sec. 214) which reads:

> "214. Except as otherwise provided in this chapter all orders of the Secretary under sections 201 to 217, inclusive, of this chapter, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside, by a court of competent jurisdiction. (Aug. 15, 1921, c. 64, Sec. 313, 42 Stat. 167)".

In Section 315 (U. S. C. 1925, Title 7, Sec. 216) also it is provided that obedience to orders, other than for the payment of money, may be enforced either by the Sec-

retary, or by any injured party, by mandatory injunction issued by the district court of the district in which the person injured has his principal place of business. And cases like the one at bar, in which parties affected by an order of the Secretary seek to suspend the same, are provided for by Section 316 of the Act (U. S. C. 1925, Title 7, Sec. 217) which is as follows:

> "217. For the purposes of sections 201 to 217, inclusive, of this chapter, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of section 201 to 217, inclusive, of this chapter, and to any person subject to the provisions of sections 201 to 217, inclusive, of this chapter. (Aug. 15, 1921, c. 64, Sec. 316, 42 Stat. 168)."

Comparing the Packers and Stockyards Act with the act to regulate commerce it appears that provision is made for the taking effect of orders of the Interstate Commerce Commission, other than those for the payment of money, by U. S. C. 1925, Title 49, Sec. 15 (2), in language almost identical with that used in Section 313 of the Packers and Stockyards Act, above quoted. So also by Section 16 of the Interstate Commerce Act as amended by later statutes (U. S. C. 1925, Title 49, Sec. 16), in sub-paragraph 2, provision is made for the enforcement of orders for the payment of money in language identical with that used in Section 309 (f) of the Packers and Stockyards Act, above quoted, the latter having been copied from the former when the Packers and Stockyards Act was enacted.

It may be noted in passing that the Interstate Commerce Act formerly included a provision making all orders of the Commission, in subsequent suits to annul or enjoin them, prima facie evidence of the facts found in such orders. In other words, the provision that the findings and orders of the Secretary shall be prima facie evidence of the facts therein stated formerly applied to rate and anti-discrimination orders as well as those for reparation, these provisions having been eliminated when the statute was amended in 1906 (34 St. L. Ch. 349, p. 584).

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1929

No. 45

TAGG BROS. & MOORHEAD, *et al.*,
Appellants,

vs.

THE UNITED STATES OF AMERICA, *et al.*,
Appellees.

Separate Brief for Appellants on the Question of the Constitutionality of the Rate Making Provisions of the Packers and Stockyards Act of 1921, insofar as they apply (as claimed by Appellees) to the Commissions of the Commission Men.

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The opinion below is reported in 29 Fed. 2nd., 750. The statement of the case, the statutes involved, the specification of the assigned errors, and argument on other questions in the case, than that here discussed, are found in a separate brief for appellants and are omitted here to avoid useless repetition.

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I

There is here presented an important question in constitutional law—the power of Congress in the exercise of its rate making authority, to fix prices for purely personal services (such as that of the commission men, for grading and selling cattle). The question is similar to that presented to the Court in the "Minimum Wage Cases," *Adkins v. Children's Hospital,* 261 U. S. 525, *Adkins* v. *Lyons,* 261 U. S. 525, *Murphy* v. *Sardell,* 269 U. S. 530; in the "Kansas Industrial Court Cases,"

Wolff Co. v. *Industrial Court,* 262 U. S. 522; in the "Ticket Brokers Cases," *Weller* v. *N. Y.,* 268 U. S. 319; *Tyson & Bro.* v. *Banton,* 273 U. S. 418; and in the "Employment Agency Case," *Ribnik* v. *McBride,* 277 U. S. 350. We submit that these decisions are conclusive and require that this appeal should be sustained.

Fortunately, the premises upon which the conclusion must be based are not in dispute. It is not questioned that the services, the compensation for which is sought to be fixed by law, are *purely personal services.* The commissions are only wages for the labor of the commission men. The Secretary of Agriculture so found in making the price fixing regulation here in question, and the testimony is uncontradicted that the services are those of skilled brokers, who handle cattle on arrival at the stockyards, grade them, put them in condition for sale, sell them to the buyer, and after deducting commission, remit the proceeds to the owner. The business is wholly one of skill and labor, with the elements of capital or other property investment negligible.

These commission men are not employees or owners of the stockyards and have no interest, direct or indirect, in the profits of the stockyards, or their "yardage" charges, nor has the stockyards any share of the compensation of the commission men. The stockyards company charges the shippers of cattle a so-called "yardage" charge per head of cattle. We do not question the power of Congress to regulate such "yardage" charges, for the stockyards are property devoted to a public use. Any man can become a commission man. He simply holds himself out to the shippers of cattle as one who can take care, in their behalf and as their representative, of the cattle on arrival at the stockyards and, as their broker, to dispose of them to the public. His only implements of trade are a horse on which to ride and a desk to keep his accounts. On the arrival of the cattle he sorts them into grades, puts them in the pens of the

stockyards, waters and feeds them and then sells them as rapidly as possible and to the best advantage. He then remits the proceeds to the shipper, less his compensation. His contracts are wholly with the shippers of the cattle.

It is skilled labor, for the commission man must know the value of cattle and the details of their care in preparing them for the market. It is also physical labor, as he must ride on horseback, often from morning to night, through the incoming herds of cattle in order to classify the shipments and he must attend to their physical wants to put them in the best condition for sale. Thus his services are those of skilled labor and the commission paid him by the shipper (not by the stockyards company) is his wages for his arduous toil.

As in all skilled labor, the commission men differ between themselves in the length of their experience, their relative aptitude for the work and their individual industry. To prescribe a common maximum of earning power is to penalize the skillful for the benefit of the unskillful.

II

The appellees contend that Section 310 of the Packers and Stockyards Act of 1921, authorizes the Secretary of Agriculture to determine and prescribe the rates or charges that may be exacted by the commission men, called, in the Act, "market agencies"; and the Secretary has so fixed such rates or charges as to the commission men at the stockyards in Omaha.

Our contention is that if the Act is to be construed as so authorizing the Secretary, the rate making provisions of the Act, so far as they apply to commission men, are beyond the power of the federal government conferred by the Constitution, and violative of the Fifth Amendment, which provides that no person shall be deprived "of life, liberty or property without due process of law,

nor shall private property be taken for public use without just compensation."

The principles upon which this question must be decided have been settled in a long line of decisions of this Court interpreting the Fifth and Fourteenth Amendments.

We may put aside the theories which support the power of the state to protect itself by those regulations directly affecting the public health, safety or morals, and only indirectly affecting property rights and rights of individual liberty—rights which must yield to the general good without that compensation provided in the Constitution for the taking of property. For we are dealing here with a more limited field of governmental activity, *Tyson & Bro.* v. *Banton,* 273 U. S. 418, 431—the rate-making power, the exercise of which *does,* primarily and admittedly, affect individual property rights and individual liberty to earn a living; which does (whatever its justification in the supposed public interest), obviously and intentionally, constitute a redistribution of wealth, a "leveling of inequalities of fortune by depriving one who has property of some part," a "compulsory exaction" from one for the support of another, a *taking,* directly, of some part of the property (wages, salary, income, return on investment, etc.) from A and handing it over to B. *Coppage* v. *Kansas,* 236 U. S. 1, 18; *Adkins* v. *Children's Hospital,* 261 U. S. 525, 557. To quote Jefferson's phrase in his first inaugural, this fixing of wages for personal service "takes from the mouth of labor the bread it has earned."

In this field of legislation, also, the principles which govern the constitutionality of the exercise of the power are now well settled, particularly by the more recent decisions of this Court.

The first of these principles is that immunity from price fixing is the rule and not the exception. This thought has been voiced and reiterated in every ex-

pression on the subject by this Court from the earliest to the latest.

In *Patterson* v. *Bark Eudora,* 190 U. S. 169, Mr. Justice Brewer laid down the "proposition" that,

> "Generally speaking, every citizen has a right freely to contract for the *price* of his labor, services or property."

In the most recent discussion of the question, *Ribnik* v. *McBride,* 277 U. S. 350, this Court said:

> "Under the decisions of this Court it is no longer fairly open to question that, at least in the absence of a grave emergency, the *fixing of prices* for food or clothing, of house rental, *or of wages to be paid,* whether minimum or maximum, is beyond the legislative power."

And with special reference to price fixing for personal services, Mr. Justice Harlan, speaking for the Court, in *Adair* v. *United States,* 208 U. S. 161 (quoted in *Adkins* v. *Children's Hospital,* supra, 545), said in even more emphatic terms:

> "The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell. . . . In all such particulars the employer and employe have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land."

The second of these principles is that the guaranties against deprivation of liberty and property in the Bill of Rights of the Constitution are not to be swept away or impaired by the other provisions of the Constitution

granting specific powers to Congress, such as the commerce clause. As said by Mr. Justice Brewer, in *Monongahela Navigation Co.* v. *United States,* 148 U. S. 310, 336:

> "But like the other powers granted to Congress by the Constitution, the power to regulate commerce is subject to all the limitations imposed by such instrument, and among them is that of the Fifth Amendment."

In *Adair* v. *United States,* 208 U. S. 161, 180, Mr. Justice Harlan reiterated

> "We need scarcely repeat what this Court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, can not be exerted in violation of any fundamental right secured by other provisions of the Constitution. Gibbons v. Ogden, 9 Wheat. 1, 196; Lottery Case, 188 U. S. 321, 353."

Finally, with special reference to price fixing for personal services, Chief Justice White, after inquiring into the extent of the commerce power and affirming that the regulation of the business of common carriers was so clearly within that power, as settled by many decisions, state and Federal, as "to leave no room for question on the subject," added the significant language (*Wilson* v. *New,* 243 U. S. 332, 347):

> "It is also *equally true* that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed-on standard is not subject to be controlled or prevented by public authority."

The third principle is that desirability of the legislation as a speedy remedy for the supposed evils, and the

difficulty of dealing with the supposed evils by other methods, constitute no warrant for resort to price fixing.

In the case of *Hurtado* v. *California,* 110 U. S. 516, Mr. Justice Matthews used the following language, referring to the powers granted to Congress under the Constitution:

> "But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. • • •
>
> " 'It must be conceded,' said this court, speaking by Mr. Justice Miller in *Loan Asso.* v. *Topeka,* 20 Wall. 655-662, 'that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after al but a despotism.' "

In *Bailey* v. *Drexel Furniture Co.,* 259 U. S. 20, 37, Chief Justice Taft, delivering the opinion of the Court on the question of the constitutionality of the Child Labor Law, said:

> "The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant or the harm which will come from breaking down recognized standards."

Mr. Justice Holmes, in *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 394, referring to the protection of private property in the Fifth Amendment, said:

> "When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. * * *
>
> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

And more recently, referring particularly to price-fixing for personal services, this Court said (*Tyson & Bro.* v. *Banton*, 273 U. S. 418-442):

> "But the difficulty or even the impossibility of thus dealing with the evils, if that should be conceded, constitutes no warrant for suppressing them by methods precluded by the Constitution. Such subversions are not only illegitimate but are fraught with the danger that, having begun on the ground of necessity, they will continue on the score of expediency, and, finally, as a mere matter of course. Constitutional principles, applied as they are written, it must be assumed, operate justly and wisely as a general thing, and they may not be remolded by law-makers or judges to save exceptional cases of inconvenience, hardship or injustice."

And, again, *Ribnik* v. *McBride* (277 U. S. 350, 358):

> "And we since have held definitely that the power to require a license for and to regulate the conduct of a business is distinct from the power to fix prices. 'The latter power is not only a more definite and serious invasion of the rights of property and the freedom of contract, but its exercise cannot always be justified by circumstances which

have been held to justify legislative regulation of the manner in which a business shall be carried on.'

"To urge that extortion, fraud, imposition, discrimination and the like have been practiced to some, or to a great, extent in connection with the business here under consideration, or that the business is one lending itself peculiarly to such evils, is simply to restate grounds already fully considered by this Court. These are grounds for regulation but not for price fixing, as we have already definitely decided."

The fourth principle, and the one most important to the proposition for which we are here contending, is that price fixing, being a direct taking of property for a supposed public benefit, can not be resorted to unless "just compensation" is given in return, and that just compensation requires an adequate and reasonable return upon the fair market value of that which is devoted to public use, or, as it is sometimes expressed, "affected with a public interest."

Smyth v. *Ames,* 169 U. S. 466;
Cotting v. *Goddard,* 183 U. S. 79, 91;
New York v. *Public Service Commission,* 269 U. S. 243, 248;
Board v. *N. Y. Telephone Co.,* 271 U. S. 23;
Ohio Valley Water Co. v. *Ben Avon Borough,* 253 U. S. 287.

"As to parties engaged in performing a public service while the power to regulate has been sustained, negatively the Court has held that the legislature may not prescribe rates which, if in force, would amount to a confiscation of property."

Cotting v. *Goddard,* supra.

"What the company is entitled to ask is a fair return upon the value of that which it employs for a public convenience."

Smyth v. *Ames*, supra.

> "The just compensation safe-guarded • • • is a reasonable return on the value of the property used at the time that it is being used for a public service, and rates not sufficient to yield that return are confiscatory."

Board v. *N. Y. Telephone Co.*, supra.

III

These principles suggest the vital distinctions, from the constitutional standpoint, in all legislative price fixing between *property* and the use of property, on the one hand, and *personal services*, on the other.

First, property originates with the state and reverts to the state (*Commonwealth* v. *Alger*, 7 Cush. 84; *Holden* v. *Hardy*, 169 U. S. 366, 392), it is held in a sense at the will of the state. Liberty is not held at the will of the state; its existence is a prerequisite to the very organization of a government of the people such as ours, and the liberty that is meant in the Constitution is not merely the freedom from physical restraint, it includes liberty to work for a living by using the powers of brain and muscle; indeed, that is of the very essence of liberty protected in the Bill of Rights. "It requires no argument," said Mr. Justice Hughes, in *Truax* v. *Raich*, 239 U. S. 33, 41, "to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the (Fourteenth) Amendment to secure."

Second, property may be taken by the state for public use. This power is inherent in the state. But liberty—personal services—may not be taken by the state for public use or any other use except as a punishment for crime or in a time of war.

Third, property, in our theory of government, always has its equivalent in money or other thing of value. So when property is taken for public use, either by taking the property directly or by taking indirectly by diminishing the income from the property, this equivalent may always be given in return, and thus the amount of property held by the individual is not diminished or impaired. When the use of *property* is regulated by price fixing, the method by which this equivalent is secured has been carefully worked out in our system of government; we ascertain the fair value of the property devoted to the public use and allow an adequate return on this value, and thus avoid confiscation.

But liberty has no actual or theoretical equivalent in money. The skill of the artist can not be compensated for by substituting the skill of the poet. The lawyer can not have his personal services as a lawyer taken away and receive just compensation by being allowed to practice medicine.

So when prices are fixed for personal services, there is no capital invested upon which an adequate and just return may be calculated. When a man devotes his brain and brawn to the earning of a livelihood, how is the Court to calculate a rate of return on the investment when nothing is invested which may be measured in dollars and cents? How can the Court fix six percent on brain power or six percent on the sweat of the brow and thus determine that there has been an adequate return, and so no confiscation?

Fourth, so when the use of *property* is regulated by price fixing, the constitutional guaranty that property shall not be taken without just compensation may be fulfilled; but when *personal services* are regulated by price fixing, there can be no equivalent offered and the constitutional guaranty can not be fulfilled.

Fifth, it follows from these rules as to property and as to personal services that, just as *property* may be

taken for a public use, so by the manner of its use it may, under certain circumstances, be said to have been dedicated to a public use or devoted to a public use or used in such a way that the public has an interest in its use, and thus arises a right to fix rates; but, by like token, personal services which *can not* be taken for a public use, also, by their very nature, *can not* be said to be dedicated to a public use or devoted to a public purpose, whatever may be the manner in which they are used, and whether the characterization of "public use" is by judicial reasoning or legislative declaration. This would be "running the public interest argument into the ground," as said by this Court in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539; using the expression of Mr. Justice Bradley in the *Civil Rights Cases*, 109 U. S. 3, 24.

This thought, that personal services can not be, in the very nature of things, said to be devoted to a public use, has been several times expressed by this Court. In *Ribnik* v. *McBride*, 277 U. S. 350 this court reaffirmed its previous statement in *Wolff* v. *Industrial Court*, *supra*:

> "It has never been supposed, since the adoption of the Constitution, that the business of the butcher, or the baker, the tailor, the wood chopper, the mining operator or the miner was clothed with such a public interest that the price of his product or his wages could be fixed by State regulation. . . . one does not devote one's property or business to the public use or clothe it with a public interest merely because one makes commodities for, and sells to, the public in the common callings of which those above mentioned are instances."

And the Court added to these instances personal services generally, even where the pay was in the form of commission instead of wages, citing such services as those of the real estate broker, the ship broker, the

merchandise broker, the ticket broker, and the employment agency, adding—

> "The public is deeply interested in all these things. The welfare of its constituent members depends upon them. The interest of the public in the matter of employment is not different in quality or character from its interest in the other things enumerated; but in none of them is the interest that 'public interest' *which the law contemplates as the basis for legislative price control.*"

Again, in *Wolff* v. *Industrial Court*, 262 U. S. 522, 539:

> "If, as in effect contended by counsel for the State, the common callings are clothed with a public interest by a mere legislative declaration, which necessarily authorizes full and comprehensive regulation within legislative discretion, there must be a revolution in the relation of government to general business. * * * It will be impossible to reconcile such result with the freedom of contract and of labor secured by the Fourteenth Amendment."

It follows from these distinctions between property and personal services that the very *basis* for legislative price control, the *sine qua non* of the exercise of the rate-making power, is wholly absent in the case of personal services, wherever they may be performed, in connection with whatever business they may be given, regardless of the public interest, and regardless of whatever grant of power in the Constitution is claimed to support the regulation.

The essential differences between "property" and "personal services," which we have pointed out, have their basis in the Constitution itself. "Property" and "liberty" may not be taken without due process of law, is the mandate of the Constitution, but in the same pro-

vision is the authority to take property upon the payment of "just compensation." Thus, property may be taken (a) by due process, that is, by determining in the usual methods the public need, etc., and (b) upon paying fair value, or in the case the taking is by price fixing, an adequate return on the property devoted to a public use. Liberty, including personal services, can be taken by due process only, that is, by determining the commission of the crime for which punishment is required.

These essential constitutional differences between "property" and "personal services" in respect of their liability to or immunity from "price fixing"—by which it may be affirmed that property, including the use of property, may be "taken" in the constitutional sense, under certain circumstances and conditions, but personal services may never be taken, whatever the circumstances and conditions—is not new or startling. It underlies all the authoritative decisions of this Court on the subject of the rate-making power. It determines the result in every case, and so it is that while regulation of the use of property by price fixing has always been sustained where (a) the property was devoted to a public use, and (b) just compensation could be made, regulation of personal services by price fixing has always been denied, whatever may have been the public interest in such services, and whatever the reasonableness of the price fixed. (The fixing of fees as a condition to the granting of a bounty by the state and the stipulation of wages as a condition of work for the state are, of course, not really exceptions, but rather affirmances of the rule.)

IV

A brief review of all the leading cases in this Court on the subject now under consideration will show that these contentions are consistent with the conclusion in every single case, without exception.

Frisbie v. *United States,* 157 U. S. 160. (Regulation of Congress forbidding attorneys to receive more than a certain amount for prosecuting claims for pensions, held constitutional on ground that the pension is a bounty, and the terms upon which it may be granted or withheld, are wholly within the discretion of Congress; at the same time affirming the doctrine that except for this right to control bounties from the government, every citizen has the right, free from legislative control, to fix the price for his labor and services.)

Holden v. *Hardy,* 169 U. S. 366. (Statute limiting the employment of workmen in under-ground mines, held constitutional solely on the ground that it was a provision for preserving the public health, the Court disclaiming any intention of holding that regulations not primarily for the public health but primarily to restrict employment, would be constitutional.)

Knovville Iron Co. v. *Harbison,* 183 U. S. 13. (Regulation requiring the redemption of store orders issued in payment of wages; held constitutional on the ground that it primarily and directly affected the public morals and safety.)

Patterson v. *Bark Eudora,* 190 U. S. 169. (Regulation making it a misdemeanor to pay seamen wages in advance; held constitutional on the ground that it was a measure directly affecting public morals, and as in *Holden* v. *Hardy, supra,* not affecting in any way the amount of the wages.)

Adair v. *United States,* 208 U. S. 161. (Act mak- it a criminal offense for any railroad company to discharge an employee on the ground that he was a member of a labor union; held unconstitutional on the ground that it was an interference with the freedom of employer and employee to fix the terms of employment, being related to that term (similar to the amount of wages) which has no direct relation to the health, safety or morals, but is intended to be primarily a restriction upon

the terms for the mere purpose of imposing such restrictions. Further, that the commerce clause gave no added right to thus arbitrarily fix the terms of employment, even though the employment was in the course of interstate commerce.)

Muller v. *Oregon,* 208 U. S. 412. (Statute limiting the hours of labor of women; held constitutional on the ground that it was a public health regulation, and assuming, as stated by Mr. Justice McKenna in *Wilson* v. *New, infra,* that the interest of the state terminated with the hours of service, and amount of compensation would be left to the agreement of the parties.)

McLean v. *Arkansas,* 211 U. S. 539. (Regulation requiring coal to be measured for payment of miners' wages, before screening; held constitutional on the ground that it was a measure to prevent fraud and requiring honest weights and measures in the transaction of business; but affirming the freedom of the right, under the Fourteenth Amendment, to make contracts for the sale of labor and to carry on trade or business.)

Riley v. *Mass,* 232 U. S. 671. (State statute limiting the hours of labor in factories for women; held constitutional following *Muller* v. *Oregon, supra.*

Smith v. *Texas,* 233 U. S. 630. (State statute prohibiting any person from acting as conductor on a passenger train without having for two years prior thereto worked as brakeman or conductor of a freight train; held unconstitutional, affirming the doctrine that the liberty protected by the Constitution means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use the powers of mind and body in any lawful calling.)

Erie Railroad Co. v. *Williams,* 233 U. S. 685. (State statute requiring semi-monthly payment of wages of employees of certain specified industries, including railroads; held constitutional as an exercise of police power

to protect the public morals and safety, following *Knoxville Iron Co.* v. *Harbison, supra,* and *McLean* v. *Arkansas, supra.*)

Coppage v. *Kansas,* 236 U. S. 1. (State statute making it a misdemeanor for an employer to require an employee not to become a member of a labor union; held unconstitutional as legislative interference with a term of employment which was not directly and primarily for the public health, safety or morals, but affecting the term of the contract for the primary purpose of restricting that term.

Miller v. *Wilson,* 236 U. S. 373. (Statute fixing maximum hours of labor for female workers; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon, supra.*)

Bosley v. *McLaughlin,* 236 U. S. 385. (Statute limiting the hours of labor for women in certain employments, including hospitals; held constitutional as a health measure on the reasoning of *Muller* v. *Oregon, supra.*)

Truax v. *Raich,* 239 U. S. 33. (Arizona statute regulating the employment of aliens, and requiring that employers should employ not less than 80 per cent qualified electors or native born citizens; held unconstitutional on the ground that it was an interference with freedom of employment not directly relating to public health, safety or morals, and affirming the doctrine that the right to work for a living in the common occupations of the community is of the very essence of personal freedom that it was the purpose of the Fourteenth Amendment to secure.)

Wilson v. *New,* 243 U. S. 332. (Act of Congress, the "Adamson Law," requiring that the then existing wage scale should continue in force pending a great public emergency; held constitutional on the ground that the interference with private rights was permitted only when a failure to agree on wages would jeopardize the nation's welfare *and then only as a temporary measure*

to meet a passing exigency, leaving the parties free to govern their relations by their own agreements after the specified time; and affirming the doctrine that, "as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is *not subject to be controlled or prevented by public authority.*")

Bunting v. *Oregon,* 243 U. S. 426. (State law fixing hours of labor; held constitutional solely on the ground that it was an "hours of service" law in the interest of public health, and although some question of overtime pay was presented, the Court disclaimed any intention of holding that a wage fixing statute could be sustained.)

Adams v. *Tanner,* 244 U. S. 590. (State law affecting the fees to be charged by employment agencies; held unconstitutional on the same principles which govern the power to fix wages of employees.)

Adkins v. *Children's Hospital,* 261 U. S. 525. (Act of Congress, applying to the District of Columbia, authorizing the fixing of minimum wages for women in various employments in the District; held unconstitutional on the ground that it was a "wage fixing law, pure and simple," and thus violated the Fifth Amendment, although many of the businesses in which employment was regulated were businesses affected with a public interest, hotels, for example; and, after a review of all the leading authorities, that were cited against the contention that the law was invalid, stating that "in none of the statutes thus sustained was the liberty of employer or employee to *fix the amount* of wages the one was willing to pay and the other willing to receive interfered with.")

Wolff Co. v. *Industrial Court,* 262 U. S. 522. (Kansas statute creating a so-called "Industrial Court" for the purpose of providing compulsory arbitration between employers and employees in business affected with a

public interest, and as a result of such arbitration, fixing the wages of employees; held unconstitutional so far as wage fixing was concerned, on the authority, principally, of *Adkins* v. *Children's Hospital, supra,* and affirming the doctrine that "there is no authority of this Court to sustain such exercise of power in respect to those kinds of business affected with a public interest.")

Radice v. *New York,* 264 U. S. 292. (State law prohibiting employment of women in restaurants between the hours of 10 P. M. and 6 A. M.; held constitutional as a health measure; but affirming the doctrine of *Adkins* v. *Children's Hospital* that a wage fixing law would be unconstitutional.)

Murphy v. *Sardell,* 269 U. S. 530. (State law fixing directly minimum wages for women, and declaring the need of such law in the interests of public health and morals, held, in a memorandum opinion, unconstitutional, as violative of the Fourteenth Amendment on the authority of *Adkins* v. *Children's Hospital, supra,* which concerned the Fifth Amendment.

Tyson & Bro. v. *Banton,* 273 U. S. 418. (Certain sections of the New York Ticket Brokers Act declaring that the price for admission to theatres is a matter affected with a public interest, and forbidding resale of tickets by any broker at a price in excess of 50 cents above the price printed on the face of the ticket; held unconstitutional as violative of the Fourteenth Amendment, affirming the principle that price fixing for personal services, such as that of a broker, is not permissible as a general rule; that a declaration of the legislature that business affected with a public interest is not conclusive on the Court; that the admitted power to regulate in many other respects does not lead to the conclusion that regulation by price fixing may also be resorted to, as the exercise of police power generally may be quite distinct from the power to fix prices; and that the provision for fixing prices cannot be sustained merely as

a measure of preventing fraud or extortion, and the difficulty or even impossibility of dealing with evils in any other way constitutes no warrant for suppressing them by methods precluded by the Constitution.)

Ribnik v. *McBride*, 277 U. S. 350. (State law requiring a license of and regulating the conduct of employment agencies, including the fixing of prices to be charged for services rendered by such employment agencies; held unconstitutional as violative of the Fourteenth Amendment so far as the price fixing features were concerned; and affirming the doctrine that the common callings could not be said to be "devoted to a public use" or "clothed with a public interest" in the sense "which the law contemplates as the basis for legislative price control"; and affirming that the wages of the butcher, the baker, the wood chopper, and the miner could not be fixed by state regulation, and adding that there is "no reason for applying a different rule in the case of legislation controlling prices to be paid for *services*" rendered by the employment agency, the real estate broker, the ship broker, the ticket broker or the merchandise broker.)

V

Thus the chain of argument is complete; all the contentions put forward to sustain price fixing for personal services, according to the exigencies of the particular case (1) that it is no different from fixing "hours of service" which is justified as a measure to protect the public health, safety or morals; (2) that it is justified if connected with a business affected with a public interest; (3) that it is proper as a regulation of interstate commerce; (4) that the theory is limited to wage fixing for laborers and does not apply to price fixing for other personal services; (5) that the business of giving personal services in exchange for pay or commissions, may itself be "dedicated to the public use" or "clothed with

a public interest''—have been cleared away one by one, until the whole truth has emerged—that ordinary legislative price fixing for purely personal services is impossible under our Constitution—all the time, everywhere.

The ''liberty'' of the citizen, protected in the Bill of Rights, means the right to work for a living in the ordinary occupations and professions, not themselves forbidden as dangerous to the public health, safety, morals or welfare; this right, like all exercises of liberty, must of necessity be restricted as to time, place and circumstance so as to be enjoyed consistently with like measure of right of his fellows making up the body politic; but it cannot be valued by the State—no price may be set upon it, and called or treated as the legal equivalent; and so it cannot, like property, be taken, either wholly or partially, for use by the State, upon paying just compensation; for there is no yardstick to gauge either the title to the right, or its use, and the Bill of Rights never contemplated that there should be; only the individual, possessor of the right, may fix its worth, in his bargaining with his fellows having equal rights.

From these decisions therefore there may be deduced the proposition—indeed, for all practical purposes, the rule—which effectively disposes of the question of price-fixing for personal services in all instances and which reconciles the conclusions reached in all the cases on the subject and, it may be said, also the reasoning by which those conclusions are reached. This simple rule is that the legislative rate-making power extends to the use of property under certain circumstances and conditions—devotion to public use, securing just compensation, etc.; it does *not* extend to personal services at all (excluding, of course, fees for securing bounty from the government, work for the government itself, and stipulations as to fees and wages in government contracts). The solid ground for this rule is, we insist, to be found in the very nature of rights of property and

rights of labor, as we conceive of them in our form of government, and the differences between the two, recognized and sanctioned in the very nature of the constitutional guarantees extended to each.

This rule has never been denied by the result reached in any decision of this Court. On the other hand, it is supported in the reasoning of all the cases where a comprehensive discussion of the subject has occurred.

VI

The argument of the Court below, if it should remain as final authority, would stand alone as an attempt to answer this ready solution of the price-fixing problem. And that answer is made by deductions from a mythical example put forward by the Court as decisive of the question—deductions which are curiously fallacious. Stating that the rule we have suggested is "interesting —possibly embarrassing," the Court below cites this supposed analogy, which, in the opinion of the Court, settles the question (*Tagg Bros., etc.*, v. *United States*, 29 Fed. 2nd, 750, 752):

> "The flow of this commerce through the stockyards may be likened to the course of travel across a toll bridge and there is an analogy if you picture such a bridge equipped with a toll gate at both its ends. When the travelers go upon the bridge, the bridge owner lifts the toll bar and collects the tolls, but when they come to the other end there is a group of men who have an arrangement with the bridge owner to lift the other toll bar for a price. Would it not be absurd to say that the bridge owner's prices may be regulated, but that the others can get together and charge anything they please—that the travelers may be protected from extortion in getting on to the bridge but not when they come to getting off? Certainly if the bridge owner's business is affected with a public use, the business of those who con-

trol the means of getting off the bridge is so a fortiori."

With all due respect, we desire to point out that the confusion of thought here is apparent upon a slight analysis. Of course, the bridge tolls may be regulated wherever they may be demanded, whether at either end of the bridge or in the middle, because the bridge company has devoted its property to the public use and in return has received a franchise from the state authorizing it to collect tolls and so its tolls may be regulated whatever agency the bridge company may see fit to employ to receive the money. But it is always and only the bridge company—the company which has devoted its property to a public use and which has received a franchise from the state—whose charges are regulated whatever the means adopted for collection, whether by a group of men acting as their agents, or otherwise, and whether the toll is collected at the bridge or by ticket agents or a group of ticket agents in all sections of the country. On the other hand, the pay which the bridge company may give to these collectors cannot be fixed by law. If the bridge company sees fit to turn over to them all the tolls received, that is a matter of private contract between the bridge company and the toll collectors. So also are the employees of the travelers free from legislative price-fixing. If the traveler sees fit to employ a chauffeur particularly qualified to guide cars over this particular bridge, the wages of such chauffeur cannot be fixed on this ground, although he exacts a toll, as it were, for guiding the traveler across the bridge.

So an agent, who undertakes for the traveler to assort and grade the cars that go over the bridge and arrange, for pay or a commission, the bridge fare, is not subject to legislative price-control, because his work is connected with getting over a bridge belonging to a bridge com-

pany whose rates and charges may be fixed by law. Travelers may be protected from extortion for the use of property devoted to a public service—they cannot be protected (by price fixing) from "extortion" in those private contracts which they make for purely personal services and it is no function of the government so to protect them, unless we admit the legality of slavery. So much is fundamental in our government and no analogy or supposed necessity can destroy the principle, grounded as it is in our basic conception of individual rights and written into our organic law.

Thus it may be confidently affirmed that personal services are not subject to price-fixing by law unless, to use the language of this Court in a recent case, "there is to be a revolution in the relation of government to general business."

Applied to the commission men, who, for a charge, agreed to between them and owners of cattle desiring to sell the same, grade and sell the cattle, the operation of the rule is plain. They are merchandise brokers, selecting and selling on commission just as are real estate brokers, ship brokers, ticket brokers, etc., as to all of whom this Court has specifically applied the rule.

VII

It may be suggested that the force of this argument is destroyed by the decision of this Court in the matter of the statute now under consideration in *Stafford* v. *Wallace*, 258 U. S. 495. A consideration of the scope of that decision and the questions actually before the Court will show that this is not the case. The Stockyards Act had been newly passed. There were grave doubts as to its constitutionality. It was argued that stockyards were not common carriers, but were public markets, and as such the property of the stockyards was not a part of interstate commerce and, therefore, could not be thus regulated. Counsel for the Government facilitated the

case to test that question, and when the case came before the Court, the one question was whether the statute, as an entirety, and as a regulation of stockyards, was a regulation in interstate commerce. The attack made upon the statute by counsel for the petitioners was almost wholly restricted to the question whether stockyards as such were subject to governmental regulation. It is true that some portions of the Act were singled out as subject to attack, as, for example, that the provision as to disclosure by the stockyard company of its operations was an unreasonable search and seizure. These questions were, however, hardly referred to in the argument. On the contrary counsel for the Government expressly disclaimed any purpose to argue the administrative details of the Act, and suggested to the Court that if the statute as an entirety could be sustained, the question of the possible validity of any or all of its administrative details could be determined hereafter. This suggestion was followed by the Court, and Chief Justice Taft pointedly said as to the scope of his opinion:

> "The *only* question here is whether the business done in the stockyards between the receipt of the live stock in the yards and the shipment of them therefrom is a part of interstate commerce, or is so associated with it as to bring it within the power of national regulation."

He also said in his opinion:

> "Other objections are made to the Act and its provisions as violative of other limitations of the Constitution, but the only one seriously pressed was that based on the Commerce Clause and we do not deem it necessary to discuss the others."

These limitations of the decision in *Stafford* v. *Wallace* were not only natural, but inevitable, because the order

of the Secretary, which affected the rights of the petitioners, and thus presented the concrete case upon which alone any decision as to constitutionality could properly be based, was a proposed order, merely requiring the stockyard owners, market agencies and dealers to register, file schedules with the Secretary of Agriculture, and furnish certain reports. It did not fix prices or rates, and therefore the concrete case before the Court did not present the question now raised under the Fifth Amendment to the Constitution.

Both in the arguments for the appellants and the arguments for the Government, the fact that the single question of the power of Congress under the Commerce clause was presented was recognized. The argument of the appellants was as follows (Page 506):

> "The decision below rests upon the syllogism that 'the stockyards themselves are instrumentalities of interstate commerce' and the dealers in live stock at the yards are 'engaged in or participating in that commerce within the stockyards'; ergo, the dealers are engaged in interstate commerce and subject to the regulatory power of Congress. We submit that both premise and conclusion are wrong. The dealers are not engaged in 'commerce with the stockyards.'"

The argument for the Government was as follows (Page 509):

> "The question here is not whether the commission merchants and dealers should be included within the act by judicial interpretation, as in *Hopkins* v. *U. S.*, 171 U. S., 578, but whether Congress had the power to designate them and their transactions as a part of the 'current of commerce' and as such within the act. • • •
>
> "Moreover, the court will not attempt to pass on the reasonableness of the rules and regulations

> of the Secretary of Agriculture, or to define his powers by a construction of the act, in advance of a concrete case raising a specific issue, as held in *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S., 194, and *Texas* v. *Interstate Commerce Commission*, 258 U. S., 158."

The fact that this Court, in the *Stafford case*, did not intend to pass upon the question here involved, is demonstrated by the fact that it would otherwise have cited cases in its opinion upon this question. Nowhere in the opinion is there any reference to cases involving the fixing of prices or wages for services. On the other hand, all the cases cited relate to the power over interstate commerce.

There are abundant indications that the Supreme Court meant to confine itself, in the *Stafford case*, to the single question, whether the packers and stockyards act concerned businesses engaged in interstate commerce, or in intrastate commerce. This question of the jurisdiction of Congress to act at all in the premises under the Commerce Clause, was the primary question, and had to be decided before there could be any effective operation of any part of the Act. It went to the heart of the law, and, if decided adversely to the Government, no section could stand.

On the other hand, the validity of any particular regulation, as to whether it took property without due process of law, or otherwise violated the Fifth Amendment, can now be considered without either destroying the Act as a whole or other portions of it, and without rendering ineffectual the decision of this Court in the *Stafford case* as to the power of Congress to supervise these instrumentalities of commerce. We recognize that the Act as a whole is constitutional, but the Courts may declare one of its provisions, after it has been acted upon affirmatively and prejudicially by the Secretary, to be unconstitutional.

An exact analogy is found in the case of *Weller* v. *New York,* 268 U. S. 319, taken in connection with *Tyson & Brother* v. *Banton,* 273 U. S. 418, decided by the Supreme Court February 28, 1927. In the former case the Supreme Court held valid an Act of the New York legislature, requiring licenses of theatre ticket brokers and the charge before the Court was reselling theatre tickets without the license required by the Act. Subsequently, the same statute again came before the Court on the price fixing features, the action being one to enjoin prosecution for re-selling theatre tickets at a price greater than that permitted by the statute. Notwithstanding the previous decision in *Weller* v. *New York,* the Court held the price fixing provisions of the statute unconstitutional. In the case of the New York Brokers Law, there was the same provision found in the case at bar, to the effect that if any section of the law was held unconstitutional, such determination should not affect the validity of the remaining provisions.

The views of this Court on this subject were expressed in the recent case of *Weaver* v. *Palmer Bros. Co.,* 270 U. S. 402, where, speaking of a decision holding unconstitutional certain features of an act of Congress notwithstanding the same act had been held constitutional in general terms in an earlier case, it was said:

> "Laws frequently are enforced which the court recognizes as possibly or probably invalid if attacked by a different interest or in a different way. *Quong Wing* v. *Kirkendall, supra,* 64. This is well illustrated by the *Powell Case* compared with *Schollenberger* v. *Pensylvania,* 171 U. S. 1. Every opinion is to be read having regard to the facts of the case and the question actually decided. *Cohens* v. *Virginia,* 6 Wheat. 264, 399."

Another analogy is found in *Wolff Packing Co.* v. *Industrial Court,* 267 U. S. 552, taken in connection with the earlier case in 262 U. S. 522. The Court said:

"When the case was first before this Court the discussion at the bar and in the briefs chiefly related to the validity of the parts of the Act permitting the fixing of wages; and the opinion then delivered particularly dealt with that question, * * *

"Both parties rely on our decision when the case was first here. One insists that by reversing the original judgment of the state court, and not merely a part of it, we adjudged the invalidity of the entire Act; and the other that by particularly declaring the provisions permitting the fixing of wages invalid and saying nothing about the provisions permitting the fixing of hours of labor we impliedly held the latter valid. Both contentions are wrong. 'A judgment of reversal is not necessarily an adjudication by the appellate court of any other than the questions in terms discussed and decided.' *Mutual Life Insurance Company* v. *Hill,* 193 U. S. 551, 553."

This language is particularly pertinent to the situation presented in the case at bar, not only on the position of the Court as to the limit of a decision on a constitutional question, but also on the propriety of referring to the briefs of counsel and the oral argument in determining the precise question that was decided in the former opinion of the Court.

The question presented in the *Stafford case* challenged the power to make any regulations of the stockyards, on the ground that the whole subject was not in the domain of interstate commerce, and therefore not within the jurisdiction of Congress. The contention here made does not contest the power of Congress to authorize regulations of packers, stockyards and market agencies, as a part of the regulation of interstate commerce. What it contests is the validity of a particular regulation as it affects individual rights. As expressed by Chief Justice Taft in the Kansas Industrial Court

cases (*Wolff Co.* v. *Industrial Court,* 262 U. S., 539), in a precisely similar situation:

> "To say that a business is clothed with a public interest is not to determine what regulation may be permissible in view of the private rights of the owner."

To say that the stockyard's business is interstate commerce, and thus may be regulated, does not imply that the government may make any regulation it sees fit with reference to that business. Each regulation must be subjected to the test of its consistency with the Bill of Rights and its validity as a true regulation of interstate commerce.

The question, therefore, is still open, whether Congress may, under the guise of a regulation of interstate commerce, fix or authorize the fixing of prices for the purely personal services of the market agencies or commission men in buying or selling cattle for others on commission.

Respectfully submitted,

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